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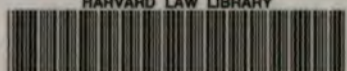
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VOL. 32—INDIANA REPORTS.

82	13	82	129	82	263	82	385	82	525
83	286	83	538	92	335	82	269	96	225
101	101	101	219	92	528	92	525	106	123
118	3	82	132	94	509	98	236	111	514
119	3	84	315	105	351	82	393	82	532
82	38	96	278	82	276	86	552	85	563
94	67	107	60	101	48	82	407	110	352
100	340	112	12	108	285	106	249	82	534
109	455	82	147	82	278	82	417	123	320
112	10	83	331	111	481	82	496	82	535
120	556	87	53	112	18	82	601	108	553
82	42	99	13	82	294	102	289	112	235
91	97	112	138	84	139	102	441	115	147
122	537	114	531	88	487	82	421	118	573
82	45	116	452	97	460	104	38	118	579
85	602	82	158	98	134	108	344	82	538
86	169	86	374	99	282	82	426	91	50
86	375	94	173	123	163	85	532	82	544
88	339	113	590	82	307	86	35	83	500
89	425	82	166	86	326	87	355	84	3
82	49	112	307	110	505	94	481	87	125
107	542	82	172	82	316	98	190	87	197
110	309	95	325	89	63	101	530	102	9
82	58	82	178	94	194	103	331	82	548
94	369	83	93	97	514	107	387	84	501
101	491	82	183	82	335	109	183	82	550
82	69	93	357	84	562	109	124	84	228
114	124	108	516	82	339	117	455	88	487
114	460	82	587	117	523	91	409	91	409
116	399	82	190	93	38	119	560	105	366
82	72	86	535	97	157	82	435	107	296
104	263	94	553	82	342	85	433	108	236
107	74	102	232	89	564	91	433	82	558
82	75	82	197	93	484	92	325	101	363
93	250	82	462	82	347	104	299	82	560
94	125	97	239	107	545	82	454	92	308
82	83	82	202	122	98	105	214	103	301
89	107	98	418	82	355	82	455	105	350
112	300	101	244	87	32	123	513	119	223
82	87	82	204	88	472	82	463	82	565
122	377	87	435	82	357	88	258	86	530
82	92	95	205	91	290	99	460	90	59
94	472	82	212	94	219	101	98	91	515
95	348	88	574	101	508	82	470	99	255
120	25	92	535	82	358	82	602	102	175
82	100	107	241	96	529	82	471	107	327
86	98	110	103	102	5	95	219	109	162
93	426	115	363	102	19	82	476	119	66
96	4	82	214	105	191	82	476	82	568
98	149	88	127	82	365	98	62	91	137
113	161	97	461	82	365	101	525	113	542
82	109	82	219	85	275	103	38	82	576
88	89	90	95	88	236	82	488	92	8
89	47	101	7	90	172	119	498	102	577
90	375	101	338	92	348	82	490	82	585
103	10	82	221	93	38	87	245	97	157
103	537	90	506	96	488	119	92	122	202
82	114	92	118	98	308	121	109	82	587
91	585	82	228	106	467	82	403	92	396
95	104	92	394	112	287	100	450	101	156
82	117	82	228	82	379	104	307	102	534
82	601	123	515	82	600	82	508	105	12
88	72	82	240	82	381	113	468	109	387
91	542	94	234	82	601	120	510	111	256
93	56	109	268	82	602	82	521	82	593
95	110	82	260	82	382	108	352	94	456
101	557	117	146	96	211	114	358	99	155
103	494			97	430	82	524	101	199
103	580			106	521	100	2	109	299
106	522					104	62		
114	368								

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REPORTS
W OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 82,
CONTAINING CASES DECIDED AT THE MAY TERM, 1882,
NOT REPORTED IN VOL. 81.

INDIANAPOLIS:
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TABLE OF THE CASES

REPORTED IN THIS VOLUME

Abbott, Supreme Lodge of the Knights of Honor v.....	1	Bunnell v. Farris	393
Adams, Ayers v.....	109	Burchfield v. State.....	580
Adams et al. v. Lee et al.....	587	Burke, Niven et al. v.....	455
Alexander, Coverdale et al. v.....	503	Burruss, Bloomfield R. R. Co. v....	83
Alexander, Adm'r, Stevens v.....	407	Butcher et al., Chambers et al. v.	508
Attica, City of, Loeb v.....	175	Butterfield, Rahm et al. v.....	163
Ayers v. Adams.....	109	Caldwell, Adm'r, et al., Belknap, Adm'r, v.....	270
Baird v. Glick.....	602	Cannon, Overmyer et al. v.....	457
Baker v. Baker.....	146	Chambers et al. v. Butcher et al.	508
Baker v. McCune.....	339	Cincinnati, Richmond and Fort Wayne R. R. Co. v. Wood.....	593
Baker v. McCune.....	585	City of Attica, Loeb v.....	175
Baldwin et al. v. Shuter.....	560	City of Vincennes, Hays v.....	178
Baldwin, Proctor v.....	370	Clark et al. v. Middlesworth et al.	240
Ballard et al., Stephenson et ux. v.	87	Clelland, Powell v.....	24
Beaty v. State.....	228	Cochran, Sample v.....	260
Beggs et al., Walker et al., Adm'r's, v.....	45	Coolman et al. v. Fleming et al.....	117
Belknap, Adm'r, v. Caldwell, Adm'r, et al.....	270	Constant, O'Donald v.....	212
Bennett et al. v. Crim.....	602	Coss, Fullen v.....	548
Bevis et ux., Heflin v.	388	Coverdale et al. v. Alexander.	503
Bilsland, Ex'r, v. McManomy.....	139	Cox v. Rash et al.....	519
Binford v. Johnston.....	426	Crane v. Crane et al.....	459
Bitting v. Ten Eyck.....	421	Crim, Bennett et al. v.....	602
Bloomfield R. R. Co. v. Burruss..	83	Darr v. State.	11
Board of Comm'r's of Knox Co., Mathesie v.....	172	Daunhauer et al. v. Hilton et al.....	531
Board of Comm'r's of County of Montgomery v. Miller.....	572	Davis et al., Martin et al. v.....	38
Board of Comm'r's of Pike Co. v. Norrington.....	190	Dick v. Hitt.....	92
Board of Comm'r's of Posey Co., Eigemann v.....	413	Dickinson et al., Sperry et al. v....	132
Board of Comm'r's of Rush Co., Morgan et al. v.....	257	Downs v. Opp, Adm'r.....	166
Board of Comm'r's of County of Tipton, Wright v.....	335	Dunn et al. v. Dunn.....	42
Boatman v. Macy	490	Eigemann v. Board of Comm'r's of Posey Co.....	413
Booth v. Fitzer.....	66	Ellis v. Keller.....	524
Bottomiff, State, ex rel. Beaver, v....	538	Eshelman v. Snyder et al.....	498
Boyd v. Olvey.....	294	Evansville, Rockport and Eastern R. W. Co. v. Harrington.....	534
Boyd et al. v. Jackson et al.....	525	Farris, Bunnell v.....	393
Bragg v. Stanford et ux.....	234	Ferrier et al., Robinson et al. v....	506
Brinkman et al. v. Ritzinger, Adm'r.....	358	First, State v.....	81
Bristor v. Bristor, Adm'r.....	276	First Nat'l Bank of Vevay, Lam- son et al. v.....	21
Brown v. Norton.....	411	Fitzer, Booth v.....	66
Brown et al., Willson et al. v.....	471	Fleming et al., Coolman et al. v....	117
Buchanan et al., Turner v.....	147	Foust et al., Morrison et al. v....	601
Bundy v. Pool et al.....	502	Frain, State v.....	532
		Frazer, Rosenzweig v.....	342
		Fullen v. Coss.....	548
		Gall, Searce v.....	255
		Glick, Baird v.....	602

Growcock v. Hall.....	202	Marquess v. La Baw.....	550
Guntle, Hallowell v.....	554	Martin et al. v. Davis et al.....	38
Hadley et al. v. Hadley.....	75	Martin v. Prather.....	535
Hadley et al. v. Hadley.....	95	Martin v. Prather.....	557
Hall, Growcock v.....	202	Martin, Pittsburgh, Cincinnati and St. Louis R. W. Co. v.....	476
Halladay et al. v. Wellington.....	409	Mathesie v. Board of Comm'rs of Knox Co.....	172
Hallowell v. Guntle.....	554	McCarthy et al., Pidgeon v.....	321
Harmon et al. v. State, ex rel. Pel- ton.....	197	McCune, Baker v.....	339
Harrington, Evansville, Rockport and Eastern R. W. Co. v.....	534	McCune, Baker v.....	585
Harris et al., Worley v.....	493	McFadden v. State, ex rel. Dykins.....	558
Hays v. City of Vincennes.....	178	McLin, Indianapolis and Vin- cennes R. R. Co. v.....	435
Hays v. Wilstach.....	13	McMahan et al. v. Newcomer et al.....	565
Hedin v. Bevis et ux.....	388	McManomy, Bilsland, Ex'r, v.....	139
Henley, Percy et al. v.....	129	McQueen et al. v. State.....	72
Hervey v. Parry et al.....	263	Means et al., Tate et al. v.....	355
Heshion v. Julian et al.....	576	Middlesworth et al., Clark et al. v.....	240
Hill v. Perry et al.....	28	Miller, Board of Comm'rs of Coun- ty of Montgomery v.....	572
Hilton et al., Daunhauer et al. v.....	531	Mills et al., State, ex rel. Metsker, v.....	126
Hitt, Dick v.....	92	Mitchell et al., Porter et al. v.....	214
Hoffman et al. v. Rothenberger.....	474	Moore, Wayne, Union and State Line T. P. Co. v.....	208
Huncheon et al., Trippe v.....	307	Morgan et al. v. Board of Comm'rs of Rush Co.....	257
Indianapolis and Vincennes R. R. Co. v. McLin.....	435	Morgan et al., Ex'rs, v. Muldoon.....	347
Jackson et al., Boyd et al. v.....	525	Morris et al., Rice v.....	204
Jeffersonville, Madison and Indi- anapolis R. R. Co. v. Oyler.....	394	Morrison et al. v. Foust et al.....	601
Johnston, Binford v.....	426	Moss et al., Tasker v.....	62
Joice et al., Stayner v.....	35	Moudy, Wilcox et al. v.....	219
Julian et al., Heshion v.....	576	Muldoon, Morgan et al., Ex'rs, v.....	347
Julien v. Woodsmall.....	568	Murdock et al., Louisville, New Albany and Chicago R. W. Co. v.....	381
Keiser v. State.....	379	Newcomer et al., McMahan et al. v.....	565
Keiser v. State.....	600	Nichols v. Nowling et al.....	488
Keller, Ellis v.....	524	Niven et al. v. Burke.....	455
Kessler, Williams v.....	183	Norrington, Board of Comm'rs of Pike County v.....	190
Kimmer et al., Westerfield v.....	365	Northwestern Mutual Life Ins. Co., Stringer v.....	100
Kious, Louisville, New Albany and Chicago R. W. Co. v.....	357	Norton, Brown v.....	411
Knowler et al., Stayner v.....	157	Nowling et al., Nichols v.....	488
Krug et al., State, ex rel. Braden, v.....	58	Nye v. Lowry et al.....	316
La Baw, Marquess v.....	550	O'Donald v. Constant.....	212
Lamson et al. v. First Nat'l Bank of Vevay.....	21	Olvey, Boyd v.....	294
Larkin, Simmon et ux. v.....	385	Opp, Adm'r, Downs v.....	166
Lee et al., Adams et al. v.....	587	Overmyer et al. v. Cannon.....	457
Lindsey v. State.....	7	Oyler, Jeffersonville, Madison and Indianapolis R. R. Co. v.....	394
Lockwood, Stockton v.....	158	Parkham v. Vandeventer.....	544
Loeb v. City of Attica.....	175	Parry et al., Hervey v.....	263
Lord et al., Sansberry et al. v.....	521	Pattison et al. v. Shaw.....	32
Louisville, New Albany and Chi- cago R. W. Co. v. Kious.....	357	Pavey, State, ex rel. Ulen, v.....	543
Louisville, New Albany and Chi- cago R. W. Co. v. Murdock et al.....	381	Pearcy et al. v. Henley.....	129
Lowry et al., Nye v.....	316	Perry et al., Hill v.....	28
Macy, Boatman v.....	490		
Malcomb, Whitworth et al. v.....	454		

TABLE OF CASES REPORTED.

v

Pfister et al., Board of Comm'r's of White Co. v. State, ex rel. Fox.....	382	State, ex rel. Braden, Krug et al. v.....	58
Pidgeon v. McCarthy et al.....	321	State, ex rel. Dykins, McFad- den v.....	558
Pittsburgh, Cincinnati and St. Louis R. W. Co. v. Martin	476	State, ex rel. Fox, Pfister et al., Board of Comm'r's of White Co. v.....	382
Pool et al., Bundy v.....	502	State, ex rel. Green et al., Stan- ton et al. v.....	463
Porter et al. v. Mitchell et al.....	214	State, ex rel. Metsker, v. Mills et al.....	126
Powell v. Clelland.....	24	State, ex rel. Pelton, Harmon et al. v.....	197
Prather, Martin v.....	535	State, ex rel. Stallard, v. White et al.....	278
Prather, Martin v.....	557	State, ex rel. Ulen, v. Pavey.....	543
Proctor v. Baldwin.....	370	Stayner v. Joice et al.....	35
Rahm et al. v. Butterfield.....	163	Stayner v. Knowler et al.....	157
Ramsey, Scott et al. v.....	330	Stepherson et ux. v. Ballard et al.....	87
Rash et al., Cox v.....	519	Stevens v. Alexander, Adm'r.....	407
Rice v. Morris et al.....	204	Stockton v. Lockwood.....	158
Ritter v. Wilson.....	601	Stringer v. Northwestern Mutual L. Ins. Co.....	100
Ritzinger, Adm'r, Brinkman et al. v.....	358	Supreme Lodge of Knights of Honor v. Abbott.....	1
Robinson et al. v. Ferrier et al.....	506	Tasker v. Moss et al.....	62
Rose v. State.....	344	Tate et al. v. Means et al.....	355
Rosenzweig v. Frazer.....	342	Ten Eyck, Bitting v.....	421
Rothenberger, Hoffman et al. v.....	474	Trippe v. Huncheon et al.....	307
Rous, Adm'r, v. Walden.....	238	Turner v. Buchanan et al.....	147
Sample v. Cochran.....	260	Vance et al. v. Schroyer et al.....	114
Sansberry et al. v. Lord et al.....	521	Vandeventer, Parkham v.....	544
Seacree v. Gall.....	255	Vincennes, City of, Hays v.....	178
Schwarm v. State.....	470	Walden, Rous, Adm'r, v.....	238
Schwarm v. State.....	602	Walker et al., Adm'r's, v. Beggs et al.....	45
Schroyer et al., Vance et al. v.....	114	Wayne and Union Straight Line T. P. Co., Shindler v.....	601
Scott et al. v. Ramsey.....	330	Wayne and Union Straight Line T. P. Co., Smelser v.....	417
Shaffer v. State.....	221	Wayne, Union and State Line T. P. Co. v. Moore.....	208
Shaw, Pattison et al. v.....	32	Wellington, Halladay et al. v.....	409
Shindler v. Wayne and Union Straight Line T. P. Co.....	601	Westerfield v. Kimmer et al.....	365
Shuter, Baldwin et al. v.....	560	White et al., State, ex rel. Stal- lard, v.....	278
Simmon et ux. v. Larkin.....	385	Whitworth et al. v. Malcomb.....	454
Smelser v. Wayne and Union Straight Line T. P. Co.....	417	Wilcox et al. v. Moudy.....	219
Snyder et al., Eshelman v.....	498	Williams v. Kessler.....	183
Sperry et al. v. Dickinson et al.....	132	Willson et al. v. Brown et al.....	471
Stanford et ux., Bragg v.....	234	Wilson, Ritter v.....	601
Stanton et al. v. State, ex rel. Green et al., v.....	463	Wilstach, Hays v.....	13
State v. First.....	81	Wood, Cincinnati, Richmond and Fort Wayne R. R. Co. v.....	593
State v. Frain.....	532	Woodsman, Julien v.....	588
State, Beaty v.....	228	Worland et al. v. State.....	49
State, Burchfield v.....	580	Worley v. Harris et al.....	493
State, Darr v.....	11	Wright v. Board of Comm'r's of County of Tipton.....	335
State, Keiser v.....	379		
State, Keiser v.....	600		
State, Lindsey v.....	7		
State, McQueen et al. v.....	72		
State, Rose v.....	344		
State, Schwarm v.....	344		
State, Schwarm v.....	602		
State, Shaffer v.....	221		
State, Worland et al. v.....	49		
State, ex rel. Beaver, v. Bottorff.....	538		

TABLE OF THE CASES

CITED IN THIS VOLUME.

Abshire v. Williams, 76 Ind. 97..487, 535	Beatie v. Butler, 21 Mo. 313.....400
Adams v. La Rose, 75 Ind. 471...554	Becker, Ex Parte, 4 Hill, 613.....302
Adams v. Stringer, 78 Ind. 175...602	Behler v. Weyburn, 59 Ind. 143...106
Ætna Ins. Co. v. Baker, 71 Ind. 102.....60, 128	Bell v. Eaton, 28 Ind. 468.....117
Aldridge v. Dunn, 7 Blackf. 249...530	Bell v. McColloch, 31 Ohio St. 397.....144
Allen v. Newberry, 8 Iowa, 65...373	Bell v. Twilight, 2 Fost. 500.....405
Allen v. Sewall, 2 Wend. 327....311	Bellefontaine R. W. Co. v. Hun- ter, 33 Ind. 335.....480
American Ins. Co. v. Avery, 60 Ind. 566.....131	Bellefontaine R. W. Co. v. Hun- ter, 5 Am. R. 201.....480
Amory v. Meredith, 7 Allen, 397..254	Belton v. Smith, 45 Ind. 291.....138
Anderson v. Ewing, 3 Litt. 245...298	Bennett v. Robinson, 27 Mich. 26..405
Anderson, etc., R. R. Co. v. Ker- nodle, 54 Ind. 314.....576	Bernal v. Hovious, 17 Cal. 542...334
Andrews v. Bank, etc., 3 Allen, 313.247	Bernitz v. Stratford, 22 Ind. 320..408
Andrews v. Brumfield, 32 Miss. 107.....254	Bescher v. State, 63 Ind. 302.....553
Anon, 1 Atkyns, 489.....362	Bessonies v. City of Indianapolis, 71 Ind. 189.....176
Arms v. Beitman, 73 Ind. 85.....23	Betts v. Starr, 5 Conn. 550.....144
Armstrong v. Scotten, 29 Ind. 495..299	Bevis v. Heflin, 63 Ind. 129.....389
Arnold v. Stanfield, 8 Ind. 324...138	Billington v. Welsh, 5 Binney, 132.405
Arnold v. Sturges, 5 Blackf. 256..421	Billington v. Welsh, 6 Am. Dec. 406.....405
Austen v. Dodwell, Eq. Abr. 318.300	Billman v. Indianapolis, etc., R. R. Co., 76 Ind. 166.....428
Austin v. Swank, 9 Ind. 109.....117	Billman v. Indianapolis, etc., R. R. Co., 40 Am. R. 230.....428
Babcock v. Hawkins, 23 Vt. 561..376	Bingham's Appeal, 64 Pa. St. 345.249
Backus v. Gallentine, 76 Ind. 367..500	Bird v. Holbrook, 4 Bing. 628...430
Bagley v. Ward, 37 Cal. 121.....537	Birge v. Gardner, 19 Conn. 507...430
Baker v. Bessey, 73 Me. 472.....502	Bishop v. Remple, 11 Ohio St. 277.254
Baker v. Bessey, 40 Am. R. 377...502	Bissell v. Wert, 35 Ind. 54.....171
Baker v. McCune, 82 Ind. 339...587	Bittings v. State, 56 Ind. 101.....229
Baker v. Neff, 73 Ind. 68.....418	Blanchard v. Blanchard, 1 Allen, 223.....247
Bank, etc., v. Arnold, 5 Paige, 38..364	Blasingame v. Blasingame, 24 Ind. 86.....466
Barnhart v. Greenshields, 28 Eng. L. & Eq. 77.....400	Bloodgood v. Clark, 4 Paige 574.363
Bassett v. Porter, 4 Cush. 487....496	Board, etc., v. Hall, 70 Ind. 469..123, 431, 552
Bate v. Sheets, 64 Ind. 209.....121	Board, etc., v. Wood, 39 Ind. 345.259
Bayless v. Glenn, 72 Ind. 5..221, 296, 431, 552	Board, Ex parte, 4 Cow. 420.....302
Beach v. Catlin, 4 Day, 284.....399	Bohn v. Brown, 33 Mich. 257....313
Beach v. Catlin, 4 Am. Dec. 221..399	Bonnell v. State, 64 Ind. 498.....229
Beals v. Beals, 20 Ind. 163.....238	
Bean v. Keen, 7 Blackf. 152.....421	

TABLE OF CASES CITED.

vii

Bosseker v. Cramer, 18 Ind. 44...	554	Cluck v. State, 40 Ind. 263.....	91
Bow v. Allenstown, 34 N. H. 351..	496	Colie v. Jamison, 4 Hun, 234.....	304
Bowen v. Pollard, 71 Ind. 177....	550	Colter v. Calloway, 68 Ind. 219...	420
Bowers v. VanWinkle, 41 Ind. 432.....	520	Commonwealth v. Sawtelle, 11 Cush. 142.....	73
Bozell v. Houser, 9 Ind. 522.....	94	Connah v. Hale, 23 Wend. 462...	99
Bradford v. Kents, 43 Pa. St. 474..	248	Connelly v. Dixon, 76 Ind. 440....	363
Brick v. Scott, 47 Ind. 299.....	135	Connelly v. Doe, 8 Blackf. 320...	320
Brooks v. Brooks, 12 S. Car. 422..	251	Continental, etc., Co. v. Stead, 95 U. S. 161.....	446, 487
Brookville Nat'l Bank v. Kimble, 76 Ind. 195.....	237	Conway v. Day, 79 Ind. 318.....	525
Brooster v. State, 15 Ind. 190.....	387	Conwell v. Clifford, 45 Ind. 392...	455
Brown v. Herron, 59 Ind. 61.....	498	Conwell v. Hagerstown, etc., Co., 2 Ind. 588.....	575
Brown v. Taylor, 13 Vt. 631.....	352	Cook v. Gwyn, 3 Atkyns, 689.....	363
Brown v. Yaryan, 74 Ind. 305.....	552	Cook v. Howe, 77 Ind. 442.....	565
Brownfield v. Weicht, 9 Ind. 394..	220	Coolidge v. Hager, 43 Vt. 9.....	502
Brucker v. Kelsey, 72 Ind. 51.....	182	Coolidge v. Hager, 5 Am. R. 256..	502
Buchanan v. Lee, 69 Ind. 117.....	369	Coolman v. Fleming, 82 Ind. 117...	601
Burkholder v. Casad, 47 Ind. 418..	320	Cooper v. Arctic Ditchers, 56 Ind. 233	310
Burrall v. Acker, 23 Wend. 606..	99	Copeland v. Copeland, 10 Ind. 341..	567
Burson v. Blair, 12 Ind. 371.....	589	Copeland v. New England Ins. Co., 22 Pick. 135.....	445
Busenbark v. Etchison D. A., 62 Ind. 314.....	491	Corbaley v. State, 81 Ind. 62.....	552
Bush v. Golden, 17 Conn. 594.....	405	Corbit v. Bank, etc., 2 Har. 235...	298
Butcher v. Stultz, 60 Ind. 170.....	516	Corbit v. Bank, etc., 30 Am. Dec. 635.	298
Butler v. Stevens, 26 Me. 484.....	406	Corey v. Swagger, 74 Ind. 211....	123
Byram v. Galbraith, 75 Ind. 134..	480, 515, 550	Cory v. Carter, 48 Ind. 327.....	285
Caldwell v. Williams, 1 Ind. 405..	387	Cory v. Carter, 17 Am. R. 738.....	285
Campbell v. Foster, 35 N. Y. 361..	40	Cox v. Louisville, etc., R. R. Co., 48 Ind. 178.....	576
Campbell v. Gould, 17 Ind. 133..	94	Cox v. Rogers, 77 Pa. St. 160.....	248
Campbell v. Johnson, 65 Mo. 439..	254	Cox v. State, 49 Ind. 568.....	356
Capp v. Stewart, 38 Ind. 479.....	88	Craig v. New York, etc., R. R. Co., 118 Mass. 431.....	487
Carper v. Kitt, 71 Ind. 24.....	455	Crassen v. Swoveland, 22 Ind. 427..	404
Carter v. Lewis, 27 Mich. 241.....	303	Cromwell v. Comegys, 7 Ala. 498..	304
Carter v. Towne, 98 Mass. 567....	429		
Casteel v. Casteel, 8 Blackf. 240..	387		
Cave v. Crafts, 53 Cal. 135.....	502		
Chambers v. Kyle, 67 Ind. 206...	26, 121		
Chase v. Stephenson, 71 Ill. 383..	285	Dale v. Kent, 58 Ind. 584.....	363
Cincinnati, etc., R. R. Co. v. Bartlett, 58 Ind. 572.....	600	Dallas v. Fosdick, 40 How. Pr. 249	286
Cincinnati, etc., R. W. Co. v. Bowen, 70 Ind. 478	270	Darter v. Brown, 48 Ind. 395.....	186
Cincinnati, etc., R. R. Co. v. Chester, 57 Ind. 297.....	269, 431	Davenport v. King, 63 Ind. 64...	23
Cincinnati, etc., R. R. Co. v. Paskins, 36 Ind. 380.....	599	Davidson v. Rankin, 34 Cal. 503..	314
City of Crawfordsville v. Irwin, 46 Ind. 438.....	590	Davis v. Warfield, 38 Ind. 461....	186
City of Delphi v. Lowery, 74 Ind. 520	521	Day v. Patterson, 18 Ind. 114....	522
City of Delphi v. Lowery, 39 Am. R. 98.....	521	Dearmond v. Dearmond, 10 Ind. 191	320
Clark v. Casler, 1 Ind. 243.....	552	Deisner v. Simpson, 72 Ind. 435..	26, 121
Clark v. Chambers, 7 Cent. L.J. 11..	428	DeLong v. Schimmel, 58 Ind. 64..	124
Clark v. Clark, 8 Paige, 152.....	552	Deming v. Bull, 10 Conn. 409.....	314
Clark v. Clark, 35 Am. Dec. 676..	552	Dewey v. Moyer, 9 Hun, 473.....	304
Clayards v. Dethick, 12 Q. B. 439..	155	Dewey v. Moyer, 72 N. Y. 70.....	304
		Dillenback v. Jerome, 7 Cow. 294..	99
		Dinehart v. Wilson, 15 Barb. 595..	334
		Dixon v. Bell, 5 M. & S. 198.....	429
		Doe v. Butler, 3 Wend. 149.....	399
		Doe v. Dutton, 2 Ind. 309.....	537

Doe v. Harter, 2 Ind. 252.....	537	Ferriter v. Tyler, 21 Am. R. 133..	286
Doe v. Jackman, 5 Ind. 283.....	568	Fesler v. Simpson, 58 Ind. 83.....	320
Doe v. Nicholls, 1 B. & C. 336....	304	Fewell v. Kessler, 30 Ind. 195....	320
Doe v. Simpson, 5 East, 162.....	304	Findley v. Cooley, 1 Blackf. 261..	43
Doe v. Timins, 1 Barn. & A. 530..	304	First Nat'l Bank v. Gay, 63 Mo.	
Donahoe v. Richards, 38 Me. 379..	286	33..	377
Draper v. Wood, 112 Mass. 315..	37	Fisher v. Johnson, 5 Ind. 492.....	530
Draper v. Wood, 17 Am. R. 92....	37	Flagg v. Mann, 2 Sumner, 486....	400
Dritt v. Snodgrass, 66 Mo. 286...286		Fleming v. Fleming, 8 Blackf.	
Dritt v. Snodgrass, 27 Am. R. 343..	286	234	520
Duckworth v. Trafford, 18 Ves. 283.	363	Fletcher v. Holmes, 32 Ind. 497..	341
Dumont v. Dufore, 27 Ind. 263...162		Floore v. Steigelmayer, 76 Ind.	
Dunning v. Galloway, 47 Ind. 182..	590	479	535, 554
Dunning v. Vandusen, 47 Ind. 423.	248	Foltz v. Hoge, 54 Cal. 28.....	285
Dunning v. Vandusen, 17 Am. R.		Forkner v. Shafer, 56 Ind. 120....	61
709	248	Fort Wayne, etc., R. R. Co. v. Hus-	
Dutch v. Boyd, 81 Ind. 146.....	220	selman, 65 Ind. 73.....	49, 356, 535
Dutton v. Warschauer, 21 Cal. 609.	406	Fort Wayne, etc., R. R. Co. v. Mus-	
Dyer v. Erie R. W. Co., 71 N Y.		setter, 48 Ind. 286	358
228	453	Foshay v. Town of Glenn Haven,	
Dykens v. Townsend, 24 N. Y. 57..	591	25 Wis. 288.....	150
		Foshay v. Town of Glenn Haven,	
Eagan v. Downing, 55 Ind. 65....	446	3 Am. R. 73.....	150
Edgerton v. Huff, 26 Ind. 35.....	570	Foster v. Brown, 65 Ind. 234.	61
Eldridge v. Long Island R. R.		Fowle v. Common Council, etc.,	
Co., 1 Sandf. 89.....	151	11 Wheat. 320.....	445
Ely v. Wilcox, 20 Wis. 551.....	404	Frelinghuysen v. Colden, 4 Paige,	
Emmons v. Newman, 38 Ind. 372..	580	204	364
Erb v. Moak, 78 Ind. 569.....	500	French v. Howard, 14 Ind. 455....	117
Ernst v. Hudson River R. R. Co.,		Frink v. Potter, 17 Ill. 406.....	151
35 N. Y. 9.....	484	Frolich v. State, 11 Ind. 213.....	345
Ernst v. Hudson River R. R. Co.,		Frost v. Dodge, 15 Ind. 139.....	189
39 N. Y. 61.....	484	Fuller v. Plainfield, etc., School,	
Evans v. Darlington, 5 Blackf.		6 Conn. 532.....	286
320	344	Funk v. Eggleston, 92 Ill. 515....	254
Evans v. Hamilton, 56 Ind. 34... 43			
Evansville, etc., R. R. Co. v. Bar-		Gale v. Parks, 58 Ind. 117.....	86
bee, 59 Ind. 592.....	336	Gallettley v. Barrackman, 12 Ind.	
Evansville, etc., R. R. Co. v. Bar-		379.....	531
bee, 74 Ind. 169.....	336	Galloway v. Stewart, 49 Ind. 156..	424
Evansville, etc., R. R. Co. v. Ep-		Galloway v. Stewart, 19 Am. R.	
person, 59 Ind. 438.....	358	677	424
		Gann v. Worman, 69 Ind. 458....	431
Fair v. Stevenot, 29 Cal. 486.....	406	Garrison v. Clark, 11 Ind. 369....	117
Fankboner v. Fankboner, 20 Ind.		Gerard v. Johnson, 12 Ind. 636..	86
62	238	Gerber v. Sharp, 72 Ind 558.....	207
Faris v. Reynolds, 70 Ind. 359....	384	Gill v. State, 72 Ind. 266.....	57, 383
Farmer v. Pauley, 50 Ind. 583....	124	Gillet v. Phillips, 13 N. Y. 114...374	
Farmer v. Ukiah, etc., Co., 56 Cal.		Gilmore v. Board, etc., 35 Ind.	
11	502	344	466
Farmers', etc., Bank v. Brewer,		Godfrey v. Godfrey, 17 Ind. 6....	220
27 Conn. 600.....	40	Golden v. Knowles, 120 Mass. 336.	446
Farrant v. Barnes, 11 C. B., N. S.		Goldsberry v. Carter, 28 Ind. 59..	189
553	432	Goodnight v. Goar, 30 Ind. 418... 41	
Farrington v. Frankfort Bank, 24		Goodwin v. Smith, 72 Ind. 113... 31	
Barb. 554.....	376	Gossett v. Tolen, 61 Ind. 388....	491
Farwell v. Tyler, 5 Iowa, 535.....	373	Gould v. Steyer, 75 Ind. 50.....	60
Fausler v. Jones, 7 Ind 277.....	369	Governor v. Carter, 3 Hawks, 328.	302
Felkner v. Scarlet, 29 Ind. 154....	392	Governor v. Carter, 14 Am. Dec.	
Ferriter v. Tyler, 48 Vt. 444.....	286	588	302

TABLE OF CASES CITED.

ix

Graeter v. Williams, 55 Ind. 461.423	Holland v. Moody, 12 Ind. 170...369
Graff v. Bonnett, 31 N. Y. 9..... 40	Hollenback v. Blackmore, 70 Ind. 234546
Graham v. Columbus, etc., R. W. Co., 27 Ind. 260.....576	Hopkins v. Jones, 22 Ind. 310....546
Graham v. Connersville, etc., R. Co., 36 Ind. 463.....576	Horner v. Doe, 1 Ind. 130..... 86
Graham v. Connersville, etc., R. Co., 10 Am. R. 56.....576	Horton v. Ipswich, 12 Cush. 488..156
Graham v. Graham, 55 Ind. 23...219	Hoskins v. Hutchings, 37 Ind. 324545
Graham v. Henderson, 35 Ind. 195 138	Hoskins v. State, 27 Ind. 470.....347
Graham v. State, 66 Ind. 386.....111	Hougland v. State, 43 Ind. 537...588
Gray v. State, 78 Ind. 68.....128	Houk v. Barthold, 73 Ind. 21-27, 220
Greenland v. Chaplin, 5 Exch. 243432	Houston v. Houston, 67 Ind. 276-522
Griffin v. Thompson, 2 How. 244.300	Howell v. Zerbee, 26 Ind. 214....491
Griffin v. Wallace, 66 Ind. 410... 61	Hubbard v. Harrison, 38 Ind. 323143, 379
Griffis v. Sellars, 2 Dev. & Bat. 492.424	Hubble v. Wright, 23 Ind. 322...135
Griggs v. Fleckenstein, 14 Minn. 81.432	Hubler v. Pullen, 9 Ind. 273...90, 477
Grignon's Lessee v. Astor, 2 How. 319123	Hughart v. Lenburg, 45 Ind. 498. 18
Guinard v. Heysinger, 15 Ill. 288. 84	Humphrey v. Thorn, 63 Ind. 296-530
	Humphreys v. Armstrong Co., 56 Pa. St. 204.....150
Hall v. Fisher, 9 Barb. 17.....302	Hunter v. McCoy, 14 Ind. 528....163
Hall v. Preble, 68 Me. 100.....254	Huston v. Neil, 41 Ind. 504.....342
Hamilton v. Naylor, 72 Ind. 171. 88	Hutts v. Hutts, 51 Ind. 581.....269
Hamilton v. State, 60 Ind. 193...298	Hutts v. Hutts, 62 Ind. 240.....337
Hamilton v. State, 28 Am. R. 653-298	Hyatt v. Clements, 55 Ind. 12..... 31
Hamilton v. Winterrowd, 43 Ind. 393403	Iles v. Watson 76 Ind. 359..... 94
Hammond v. People, 32 Ill. 446.. 84	Indiana, etc., Co. v. State, 53 Ind. 575337
Hamrick v. Danville, etc., Co., 41 Ind. 170.....531	Indiana, etc., R. W. Co. v. Bradley, 7 Ind. 49.....466
Hankins v. Kingsland, 2 Hall, 425. 99	Indiana, etc., R. W. Co. v. McKernan, 24 Ind. 62.....344
Harmon v. State, 82 Ind. 197.....492	Indiana, etc., R. W. Co. v. Oakes, 20 Ind. 9.....575
Harris v. Harris, 61 Ind. 117.....145	Indianapolis, etc., R. W. Co. v. Crandall, 58 Ind. 365599
Harrower v. Heath, 19 Barb. 331.334	Indianapolis, etc., R. R. Co. v. Christy, 43 Ind. 143.....598
Hart v. Walker 77 Ind. 331.....500	Indianapolis, etc., R. R. Co. v. Keeley's Adm'r, 23 Ind. 133....431
Haskit v. Elliott, 58 Ind. 493.... 89	Indianapolis, etc., R. R. Co. v. McCaffery, 72 Ind. 294.....501
Hastings v. Drew, 76 N. Y. 9.....312	Indianapolis, etc., R. R. Co. v. Oestel, 20 Ind. 231.....599
Hauser v. Roth, 37 Ind. 89.....468	Ingalls v. Bills, 9 Met. 1.....151
Hawes v. Rhoads, 34 Ind. 79.....138	Irwin v. Ivers, 7 Ind. 308..... 44
Hawkins v. Hawkins, 28 Ind. 66. 86	Jackson v. Ashton, 10 Pet. 480...122
Hedrick v. Hedrick, 55 Ind. 78-121	Jackson v. Burton, 1 Wend. 341-399
Hedrick v. Hedrick, 74 Ind. 78-171	Jackson v. Marsh, 5 Wend. 44...352
Helm v. Frisbie, 59 Ind. 526.....568	Jackson Tp. v. Barnes, 55 Ind. 136.....138, 420
Henderson v. Henderson, 3 Hare, 100144	Jeffersonville, etc., R. R. Co. v. Beatty, 36 Ind. 15.....599
Henry v. Southern, etc., R. R. Co., 50 Cal. 176.....428	Jeffersonville, etc., R. R. Co. v. Lyon, 72 Ind. 107.....358
Hereth v. Merchants' Nat'l Bank, 34 Ind. 380.....376	Jeffersonville, etc., R. R. Co. v. Oyler, 60 Ind. 383.....401
Hewes v. Wiswell, 8 Greenl. 98...406	
Higert v. Trustees, etc., 53 Ind. 326578	
Higgins v. Kendall, 73 Ind. 522-480	
Higginson v. Mein, 4 Cranch, 415-399	
Hodgkins v. Inhabitants, etc., 105 Mass. 475.....286	
Holland v. Johnson, 51 Ind. 346 262	

Jeffersonville, etc., R. R. Co. v. Riley, 39 Ind. 568.....	532	Lange v. Kohne, 1 McCord, 115.....	298
Jessup v. Carey, 61 Ind. 584.....	302	Lathrop In re, 3 Benedict, 490.....	304
Johnson v. Belden, 2 Lans. 433.....	155	Lawton v. Case, 73 Ind. 60.....	88
Johnson v. Burns, 80 Ind. 130....	23	Layman v. Shultz, 60 Ind. 541....	135
Johnson v. Cornett, 29 Ind. 59.....	143	Leary v. Ebert, 72 Ind. 418.....	49
Johnson v. Smith, 64 Ind. 275....	382	Lemmon v. Whitman, 75 Ind. 318	446
Jones v. Housatonic R. R. Co., 107 Mass. 261.....	150	Lemmon v. Whitman, 39 Am. R. 150	446
Jones v. Pothast, 72 Ind. 158.....	88	Lewis v. Brackenridge, 1 Blackf. 220	546
Jones v. Radatz, 27 Minn. 240....	377	Lewis v. Brackenridge, 12 Am. Dec. 228	546
Jordan v. D'Heur, 71 Ind. 199.....	535	Lippard v. Edwards, 39 Ind. 165. 41	
Judd v. Fargo, 107 Mass. 264.....	154	Little v. Thompson, 24 Ind. 146....	125
Keating v. State, 44 Ind. 449.....	550	Locke v. Falk, 76 Ind. 520....	487, 535
Keegan v. Carpenter, 47 Ind. 597....	466	Long v. Dixon, 55 Ind. 352.....	506
Keffe v. Milwaukee, etc., R. W. Co., 21 Minn. 207.....	430	Louisville, etc., R. W. Co. v. Breckenridge, 64 Ind. 114.....	358
Keffe v. Milwaukee, etc., R. W. Co., 18 Am. R. 393.....	430	Louisville, etc., R. W. Co. v. Murdock, 82 Ind. 381.....	601, 602
Keiser v. State, 82 Ind. 379.....	600	Louisville, etc., R. W. Co. v. Richardson, 66 Ind. 43.....	434
Keith v. Champer, 69 Ind. 477....	134	Louisville, etc., R. W. Co. v. Richardson, 32 Am. R. 94.....	434
Keller v. Boatman, 49 Ind. 104....	138	Louthain v. Fitzer, 78 Ind. 449... 79	
Kelley v. Love, 35 Ind. 106.....	589	Lowe v. Miller, 3 Grat. 205.....	334
Kellogg v. Tout, 65 Ind. 146.....	60	Lowrey v. City of Delphi, 55 Ind. 250	176
Kendall v. Lawrence, 22 Pick. 540	406	Lyman v. Bank, etc., 12 How. 225....	374
Kennayde v. Pacific R. R. Co., 45 Mo. 255.....	484	Lynch v. Nurdin, 1 Q. B. 29.....	429
Kennedy v. Briere, 45 Tex. 305....	298	Lyons v. People, 68 Ill. 271.....	346
Kennedy v. Richardson, 70 Ind. 524	268	Macy v. Combs, 15 Ind. 469.....	580
Kennedy v. State, 6 Ind. 485.....	345	Mandlove v. Lewis, 9 Ind. 194....	163
Kerr v. Forgue, 54 Ill. 482.....	430	Marion T'p, etc., Co. v. Norris, 37 Ind. 424	314
Kimble v. White Water, etc., Co., 1 Ind. 285.....	575	Marsh v. Vawter, 71 Ind. 22.....	61
King v. Jefferson City, etc., Board, 71 Mo. 628.....	289	Martin v. Martin, 74 Ind. 207....	90
King v. Jefferson City, etc., Board, 36 Am. R. 499.....	289	Martin v. Ray, 1 Blackf. 291	186
King v. Marsh, 37 Ind. 389.....	469	Mason v. Kellogg, 38 Mich. 132....	353
Kissel v. Eaton, 64 Ind. 248.....	586	Masterson v. New York, etc., R. Co., 84 N. Y. 247.....	453
Kistler v. State, 54 Ind. 400.....	74	Masterson v. New York, etc., R. Co., 38 Am. R. 510.....	453
Krewson v. Cloud, 45 Ind. 273....	403	Mavity v. Eastridge, 67 Ind. 211....	537
Krider v. Lafferty, 1 Whart. 303....	400	Maxwell v. Morehart, 66 Ind. 301....	377
Krug v. McGilliard, 76 Ind. 28 ..	61	May v. Fletcher, 40 Ind. 575.....	342
Lafayette Ins. Co. v. French, 18 How. 404.....	84	Mayes v. Goldsmith, 58 Ind. 94....	578
Lafayette, etc., R. R. Co. v. Adams, 26 Ind. 76.....	392	McCabe v. Goodwine, 65 Ind. 288....	198
Lafayette, etc., R. R. Co. v. Smith, 6 Ind. 249.....	575	McCaffrey v. Corrigan, 49 Ind. 175....	342
Lagow v. Badollet, 1 Blackf. 416....	530	McCallister v. Mount, 73 Ind. 559. 480, 565	
Lagow v. Badollet, 12 Am. Dec. 258	530	McCaslin v. State, 44 Ind. 151....	364
Lamb v. Stone, 11 Pick. 527.....	65	McClain v. Davis, 77 Ind. 419....	107
Lamphier v. State, 70 Ind. 317....	229	McCloskey v. I. M. & C. Union, 67 Ind. 86.....	23
Landers v. George, 40 Ind. 160....	218	McConnell v. Martin, 52 Ind. 434. 89	
Laney v. Laney, 2 Ind. 196.....	43	McCormack v. Terre Haute, etc., R. R. Co., 9 Ind. 283.....	575

TABLE OF CASES CITED.

xi

McGillis v. Slattey, 52 Ind. 44-468	Newton Co., etc., Co. v. Nofsinger, 43 Ind. 566.....419
McGregg v. State, 4 Blackf. 101-231	Noble v. Epperly, 6 Ind. 468.....186
McKinlay v. Shank, 24 Ind. 258-518	Nopson v. Horton, 20 Minn. 268-303
McKinney v. Pierce, 5 Ind. 422-468	Norman v. Norman, 11 Ind. 288-238
McKinsey v. Bowman, 58 Ind. 88-121	Nottingham v. Calvert, 1 Ind. 527-341
McMahon v. Macy, 51 N. Y. 155-312	Noyes v. Hall, 97 U. S. 34.....404
McMannus v. Smith, 53 Ind. 211-566	Null v. White Water, etc., Co., 4 Ind. 431575
Megowan v. Commonwealth, 2 Met. Ky. 3.....177	
Mercer v. Patterson, 41 Ind. 440-532	O'Connor v. Coats, 79 Ind. 596...214
Meredith v. Wise, 1 Molloy, 27...363	Ohio, etc., R. W. Co. v. Collarn, 73 Ind. 261.....433, 446
Mershon v. State, 51 Ind. 14231	Ohio, etc., R. W. Co. v. Collarn, 38 Am. R. 134.....433, 446
Metcalfe v. Pulvertoft, 1 Ves. & B. 180.....363	Ohio, etc., R. W. Co. v. Dickerson, 59 Ind. 317.....518
Miles v. Lingerman, 24 Ind. 385-108	Ohio, etc., R. W. Co. v. McClure, 47 Ind. 317.....358
Miller v. Blackburn, 14 Ind. 62-369	Ohio, etc., R. W. Co. v. Nickless, 73 Ind. 382.....550
Miller v. Porter, 71 Ind. 521-123, 446	Ohio, etc., R. W. Co. v. Rowland, 50 Ind. 349.....598
Miller v. Race, 1 Burr. 452.....300	Ohio, etc., R. W. Co. v. Selby, 47 Ind. 471.....478
Miller v. Royce, 60 Ind. 189.....525	Orphan Asylum v. McCartee, Hopkins Ch. 429.....362
Miller v. Voss, 40 Ind. 307.....550	Ottman v. Moak, 3 Sandf. Ch. 431-144
Miller v. White, 50 N. Y. 137.....312	Owens v. Lewis, 46 Ind. 488..... 44
Millikan v. State, 70 Ind. 310... 34	
Millner v. Hyland, 77 Ind. 458...219, 369, 523, 571	Paine v. Barnes, 100 Mass. 470...247
Minot v. Mitchell, 30 Ind. 228... 44	Parker v. Farley, 10 Cush. 279...424
Mitchell v. Dibble, 14 Ind. 526...171	Parker v. Hubble, 75 Ind. 580...111
Mitchell v. Geisendorff, 44 Ind. 358466	Parker v. Huntington, 2 Gray, 124.....424
Mokelumne Hill, etc., Co. v. Woodbury, 14 Cal. 265.....314	Parton v. Yates, 41 Ind. 456..... 43
Morgan v. Edwards, 53 Wis. 599-379	Passwater v. Edwards, 44 Ind. 343-588
Morgan v. Edwards, 40 Am. R. 781379	Pate v. First Nat'l Bank, etc., 63 Ind. 254.....377
Morgan v. S. A. Organ Co., 73 Ind. 179.....134, 420	Patten v. Moore, 32 N. H. 382...405
Moore v. Board, etc., 59 Ind. 516-259	Patterson v. Lord, 47 Ind. 203-219, 532
Moore v. State, 71 Ind. 478.....419	Paul v. Ball, 31 Tex. 10.....298
Morrill v. Brown, 15 Pick. 173...298	Paul v. Connersville, etc., R. R. Co., 51 Ind. 527.....404
Morris v. Edwards, 1 Ohio, 189...298	Pearson v. East, 36 Ind. 27..... 44
Morse v. Richmond, 41 Vt. 288...155	Pease v. Pilot Knob Iron Co., 49 Mo. 124.....249
Mountjoy v. State, 78 Ind. 172... 10	Pence v. Croan, 51 Ind. 336..... 43
Muir v. Berkshire, 52 Ind. 149...472	Pendergast v. McCaslin, 2 Ind. 87. 16
Mullendore v. Wertz, 75 Ind. 431. 23	People v. Board, etc., 18 Mich. 400-285
Mullikin v. City of Bloomington, 72 Ind. 161.....419, 498	People v. Bogart, 36 Cal. 245..... 73
Muncey v. Joest, 74 Ind. 409-27, 123	People v. Mayhew, 26 Cal. 655...303
Myers v. State, 45 Ind. 160.....552	People v. McCarty, 48 Cal. 557...346
	People v. Mechanics' Aid Society, 22 Mich. 86.....286
Nave v. Hadley, 74 Ind. 155.....420	People v. Medical Society, etc., 24 Barb. 570.....286
Naderhouser v. State, 28 Ind. 257502	People v. Medical Society, etc., 32 N. Y. 187.....286
Neff v. Mooresville, etc., G. R. Co., 66 Ind. 279.....211	
New v. Reissner, 56 Ind. 118..... 61	
New Albany, etc., Co. v. Stallcup, 62 Ind. 345.....420	
Newhouse v. Clark, 60 Ind. 172-446	
New Ipswich Factory v. Batchel- der, 3 N. H. 190.....502	
S. C., 14 Am. Dec. 346.....502	

People v. Wheaton College, 40 Ill. 186..... 285	Rollins v. State, 62 Ind. 46..... 74
Peoria, etc., R. R. Co. v. Siltman, 88 Ill. 529..... 487	Rose v. Colter, 76 Ind. 590..... 43
Perry v. Turner, 55 Mo. 418..... 459	Ross v. Boswell, 60 Ind. 235..... 61
Pierce v. Milwaukee, etc., Co., 38 Wis. 253..... 459	Rothrock v. Perkinson, 61 Ind. 39. 31
Pittsburgh, etc., R. R. Co. v. Noel, 77 Ind. 110..... 501	Rowe v. Lewis, 30 Ind. 163..... 399
Pittsburgh, etc., R. W. Co. v. Vin- ing's Adm'r, 27 Ind. 513..... 431	Rudolph v. Lane, 57 Ind. 115..... 49
Pittsburgh, etc., R. R. Co. v. Wil- liams, 74 Ind. 462..... 434	Ruffing v. Tilton, 12 Ind. 259..... 531
Pitzer v. Indianapolis, etc., R. W. Co., 80 Ind. 569..... 81	Rulison v. Post, 79 Ill. 567..... 285
Porter v. Choen, 60 Ind. 338..... 426	Sayre v. McEwen, 41 Ind. 109.... 94
Potter v. Faulkner, 1 Best & S. 800..... 430	Scheible v. Law, 65 Ind. 332..... 480
Powell v. Deveney, 3 Cush. 300.... 432	Schoonover v. State, 17 Ohio St. 294..... 346
Prather v. State Bank, 3 Ind. 356. 300	Schori v. Stephens, 62 Ind. 441.... 567
President, etc., v. Dusouchett, 2 Ind. 586..... 156	Schunck v. Gegenseitiger, etc., Fond, 44 Wis. 369..... 6
Priddy v. Dodd, 4 Ind. 84..... 481	Schwarm v. State, 82 Ind. 470.... 602
Pugh v. Irish, 43 Ind. 415..... 498	Scobey v. Gibson, 17 Ind. 572.... 546
Putnam v. Wise, 1 Hill, 234..... 334	Scott v. Commonwealth, 5 J. J. Marshall, 643..... 302
Ragan v. Haynes, 10 Ind. 348.... 220	Scott v. Millard, 10 Ind. 158..... 588
Ragsdale v. Parrish, 74 Ind. 191.. 134	Scott v. Shephard, 2 W. Black. 892..... 428
Railroad Co. v. Aspell, 23 Pa. St. 147..... 151	Scranton v. Stewart, 52 Ind. 68... 108
Railroad Co. v. Stout, 17 Wal. 657. 430	Scraper v. Pipes, 59 Ind. 158..... 124
Reed v. Vaughan, 15 Mo. 137.... 306	Sea Ins. Co. v. Stebbins, 8 Paige, 565..... 364
Reed v. Watson, 27 Ind. 443..... 320	Shafer v. Moriarty, 46 Ind. 9..... 312
Reeder v. Maranda, 66 Ind. 485. 314	Shank v. Butsch, 28 Ind. 19..... 320
Reeves v. Delaware, etc., R. R. Co., 30 Pa. St. 454..... 150	Sharpe v. Davis, 76 Ind. 17..... 43
Reid v. State, 58 Ind. 406..... 466	Shaw v. Ferguson, 78 Ind. 547.... 344
Reissner v. Oxley, 80 Ind. 580.... 236	Shaw v. Kent, 11 Ind. 80..... 468
Resor v. Johnson, 1 Ind. 100..... 552	Shawhan v. Wherritt, 7 How. 627. 306
Reynolds v. Copeland, 71 Ind. 422. 566	Sheridan v. Brooklyn, etc., R. R. Co., 36 N. Y. 39..... 432
Reynolds v. Faris, 80 Ind. 14.... 384	Sherman v. Hogland, 54 Ind. 578. 43
Richardson v. Howk, 45 Ind. 451.. 36	Sherman v. Inhabitants, etc., 8 Cush. 160..... 289
Richter v. Koster, 45 Ind. 440.... 424	Sherman v. Sherman, 3 Ind. 337. 238
Ricket v. Stanley, 6 Blackf. 169. 421	Sherwin v. Bugbee, 16 Vt. 439.... 496
Riddle v. Parke, 12 Ind. 89..... 218	Shilling v. Templeton, 66 Ind. 585. 88
Ridgeway v. Dearing, 42 Ind. 157..... 480, 565	Shin v. Bosart, 72 Ind. 105..... 134
Ringle v. Weston, 23 Ind. 588.... 588	Shirts v. Irons, 54 Ind. 13..... 589
Roberts v. City of Boston, 5 Cush. 198..... 286	Shoutly v. Miller, 1 Ind. 544.... 557
Roberts v. Shroyer, 68 Ind. 64.... 305	Siceloff v. Redman's Adm'r, 26 Ind. 251..... 568
Robertson v. Shutt, 9 Bush. 659. 591	Sidener v. White, 46 Ind. 588.... 522
Robie v. Sedgwick, 35 Barh. 319. 496	Simmons v. Cloonan, 81 N. Y. 557. 502
Robinson v. New York, etc., R. R. Co. 66 N. Y. 11..... 453	Sims v. Everhardt, 102 U. S. 300. 108
Robinson v. New York, etc., R. R. Co., 23 Am. R. 1..... 453	Simpson v. Payne, 58 Ind. 432.... 507
Robinson, etc., Works v. Chan- dler, 56 Ind. 575..... 554	Singleton v. Pidgeon, 21 Ind. 118. 269
Rogers v. Rogers, 46 Ind. 1..... 89	Sisk v. Woodruff, 15 Ill. 15..... 353
	Smelser v. Wayne, etc., Co., 82 Ind. 417..... 496, 601
	Smith v. Denman, 48 Ind. 65..... 219
	Smith v. Hiscob, 14 Me. 449..... 376
	Smith v. Kyler, 74 Ind. 575..... 213
	Smith v. Meiser, 51 Ind. 419..... 568
	Smith v. Smith, 76 Ind. 356..... 555
	Smith v. Yule, 31 Cal. 180..... 405

TABLE OF CASES CITED.

xiii

Smock v. Ripley, 62 Ind. 81.....	378	Tabor v. Missouri Valley R. R. Co., 2 Am. R. 517.....	484
Smyth v. Tankersley, 20 Ala. 212.	334	Talbott v. Kennedy, 76 Ind. 282.	487,
Snell v. State, 43 Ind. 359.....	200		535
Snelson v. State, 16 Ind. 29.....	123	Tate v. Ohio, etc., R. R. Co., 10 Ind. 174	41
Snyder v. State, 59 Ind. 105.....	231	Taylor v. McClure, 28 Ind. 39....	320
Snyder v. Studebaker, 19 Ind. 462.	418	Taylor v. Short, 40 Ind. 506.....	516
Somers v. Pumphrey, 24 Ind. 231.	425	Taylor v. Stockwell, 66 Ind. 505.	546
Somers v. Schmidt, 24 Wis. 417.	352	Teague v. Fowler, 56 Ind. 569....	516
Somers v. Schmidt, 1 Am. R. 191.	352	Teal v. Spangler, 72 Ind. 381-296,	552
Southmayd v. Russ, 3 Conn. 52 ..	312	Terrell v. State, 66 Ind. 570.....	94
Spahr v. Schofield, 66 Ind. 168.	124, 491	Terre Haute, etc., R. R. Co. v. Clark, 73 Ind. 168.....	478
Spear v. Cummings, 23 Pick. 224.	286,	Thomas v. Hamilton, 71 Ind. 277.	60
	289	Thomas v. Ruddell, 66 Ind. 326.	376
Spiller v. Inhabitants, etc., 12 Al- len, 127.....	286	Thomas v. Western U. T. Co., 100 Mass. 156.....	156
Stafford v. Davidson, 47 Ind. 319.	455	Thompson v. Cincinnati, etc., R. Co., 54 Ind. 197.....	155
Starry v. Winning, 7 Ind. 311....	169	Thompson v. Sweetser, 43 Ind. 312	218
State v. Burton, 45 Wis. 150.....	286	Tillman v. Kircher, 64 Ind. 104-121	
State v. Burton, 30 Am. R. 706....	286	Tillotson v. Race, 22 N. Y. 122.	238
State v. Clark, 16 Ind. 97.....	552	Tilton v. Nelson, 27 Barb. 595....	248
State v. Druly, 3 Ind. 431.....	200	Titlow v. Hubbard, 63 Ind. 6.....	559
State v. Duffy, 7 Nev. 342.....	285	Todhunter v. Randall, 29 Ind. 275	314
State v. Duffy, 8 Am. R. 713.....	285	Toledo, etc., R. W. Co. v. Shuck- man, 50 Ind. 42.....	478
State v. Gachenheimer, 30 Ind. 63.	123	Town of Williamsport v. Kent, 14 Ind. 306.....	497
State v. McLaughlin, 77 Ind. 335.	201	Townsend v. Wathen, 9 East, 277.	429
State v. Moore, 31 Conn. 479.....	430	Townsley v. Sumrall, 2 Pet. 170.	376
State v. Pottmeyer, 33 Ind. 402 ..	570	Train v. Gridley, 36 Ind. 241.....	516
State v. Pottmeyer, 5 Am. R. 224.	570	Trimble v. Trimble, 2 Ind. 76....	520
State v. Prime, 54 Ind. 450.....	198	Truitt v. Truitt, 38 Ind. 16.....	531
State v. Salyers, 19 Ind. 432.....	198	Trustees, etc., v. People, 87 Ill. 303.	285
State v. Smith, 55 Ind. 385.....	543	Trustees, etc., v. People, 29 Am. R. 55.....	285
State v. State, 12 Pet. 657.....	123	Tuley v. McClung, 67 Ind. 10.....	378
State v. Taunt, 16 Minn. 109.....	73	Turner v. First Nat'l Bank, etc., 78 Ind. 19.....	17, 369
State v. Trout, 75 Ind. 563.....	588	Tuttle v. Churchman, 74 Ind. 311.	17
State v. Wenzel, 77 Ind. 428.....	566	Uhl v. Harvey, 78 Ind. 26.....	218
State v. Womack, 72 N. C. 397....	553	Umsted v. Buskirk, 17 Ohio St. 113.....	459
Steevens v. Earles, 25 Mich. 40...	304	United States v. Arredondo, 6 Pet. 691.....	123
Stevens v. City of Logansport, 76 Ind. 498	480	United States Bank v. Bank of Georgia, 10 Wheat. 333.....	300
Stewart v. Rankin, 39 Ind. 161... 91		Vail v. Meyer, 71 Ind. 159.....	88
St. Louis, etc., R. W. Co. v. Mathias, 50 Ind. 65.....	478	Vanduyne v. Hepner, 45 Ind. 589.	399
St. Louis, etc., R. W. Co. v. Myr- tle, 51 Ind. 566.....	482	Vann v. Barnett, 2 Bro. C. C. 158.	363
Stockwell v. Thomas, 76 Ind. 506.	49	Veatch v. State, 60 Ind. 291.	346
Stoddard v. Johnson, 75 Ind. 20.	123	Verplank v. Caines, 1 Johns Ch. 57.....	362
Stone v. State, 75 Ind. 235.....	588		
Stoneman v. Pyle, 35 Ind. 103....	377		
Strong v. Clem, 12 Ind. 37.....	545		
Sullivan v. McGowen, 33 Ind. 139	520		
Supreme Lodge, etc., v. Johnson, 78 Ind. 110.....	500		
Sutherland v. Hankins, 56 Ind. 343	89		
Swales v. Southard, 64 Ind. 557.	356		
Switzer v. Miller, 58 Ind. 561....	61		
Tabor v. Missouri Valley R. R. Co., 46 Mo. 353.....	484		

Wabash, etc., R.W.Co. v. Forshee, 77 Ind. 158.....	599	Whiting v. Peckham, 15 Mass. 243	424
Wade v. Malloy, 16 Hun, 226....	249	Wiler v. Manley, 51 Ind. 169.....	186
Waler v. Cox, 25 Ind. 271.....	530	Wiley v. Pavay, 61 Ind. 457.....	306
Wallace v. Cravens, 34 Ind. 534..	392	Wiley v. Pavay, 28 Am. R. 677..	306
Wallace v. Reed, 70 Ind. 263.....	420	Wiley v. Wilson, 77 Ind. 596....	106
Ward v. Flood, 48 Cal. 36.....	285	Williams v. Little, 11 N. H. 66...	376
Ward v. Polk, 70 Ind. 309.....	314	Williams v. Nesbit, 65 Ind. 171..	94
Water Works Co. v. Burkhart, 41 Ind. 364.....	571	Willson v. Glenn, 77 Ind. 585....	201
Waterman v. Waterman, 34 Mich. 490	298	Wilson v. Vance, 55 Ind. 394.....	343
Weatherill v. Harris, 67 Ind. 452..	248	Winsett v. State, 54 Ind. 437.....	11
Webb v. Watson, 18 Iowa, 537...	302	Wolcott v. Mack, 53 Ind. 269....	518
Webster v. Wadsworth, 44 Ind. 233	552	Wood v. Brewer, 9 Ind. 86	362
Weick v. Lander, 75 Ill. 93.....	432	Wood v. Wallace, 24 Ind. 226....	40
Wellington v. Downer, etc., Co., 104 Mass. 64	432	Woodruff v. Garner, 27 Ind. 4....	16
Wellington v. Small, 3 Cush. 145.	65	Woods v. North, 84 Pa. St. 407....	377
Weston v. Lumley, 33 Ind. 486...	123	Woodworth v. Bank of America, 19 Johns. 391.....	37
Wheeler v. Robb, 1 Blackf. 330...	421	Woodworth v. Bank of America, 10 Am. Dec. 239.....	37
Wheeler v. Robb, 12 Am. Dec. 245	421	Wright v. Pindar, Style 34.....	445
White v. Hicks, 33 N. Y. 383.....	248	Young v. Black, 7 Cranch, 565...	445
White v. Hyatt, 40 Ind. 385.....	491	Young v. Rosenbaum, 39 Cal. 646.	314
White v. Smith, 46 N. Y. 418....	420	Youngs v. Lee, 18 Barb. 187.....	376
White v. State, 69 Ind. 273.....	496	Zehner v. Aultman, 74 Ind. 24...	213
Whitfield, Ex parte, 2 Atk. 315..	362	Zook v. Clemmer, 44 Ind. 15.....	207

JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. JAMES L. WORDEN.*†
HON. WILLIAM A. WOODS.†
HON. WILLIAM E. NIBLACK.†
HON. GEORGE V. HOWK.†
HON. BYRON K. ELLIOTT.†

*Chief Justice at the May Term, 1882.

†Term of office commenced January 1st, 1877.

‡Term of office commenced January 3d, 1881.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.†

* Chief Commissioner.

† Appointed April 27th, 1881.

‡ Appointed May 29th, 1882.

(xvi)

OFFICERS
OF THE
SUPREME COURT.

CLERK,
JONATHAN W. GORDON.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
FREDERICK HEINER. .



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1882, IN THE SIXTY-SIXTH
YEAR OF THE STATE.

No. 10,265.

THE SUPREME LODGE OF THE KNIGHTS OF HONOR v.
ABBOTT.

MUTUAL BENEFIT SOCIETY.—*Knights of Honor.*—*Liability Upon Death of Member.*—An action will lie against the Supreme Lodge of the Knights of Honor, to recover the amount provided by the by-laws of such society to be paid upon the death of a member of a subordinate lodge, by the beneficiary.

SAME.—*Construction of By-Law or Order of Supreme Lodge.*—*Suspension of Lodge.*—An order or by-law of the Supreme Lodge, reading as follows: "Any lodge failing, neglecting or refusing to forward assessments within thirty days from the date of notice of the death, shall stand suspended, and that if a death occur in said lodge during such suspension, no death benefit shall be paid," is to be construed as if it read "if a death occur in said lodge during such suspension, no death benefit shall be paid during such suspension."

SAME.—*Effect of Restoration of Suspended Lodge.*—*Answer.*—When the subordinate lodge is restored, then the rights of members to benefits are also revived; and an answer averring the suspension of a subordinate lodge, in an action against the Supreme Lodge to recover a death benefit by the beneficiary of a deceased member, but showing the restoration of the subordinate lodge a few days after the death of the member, is insufficient on demurrer.

From the Marion Superior Court.

The Supreme Lodge of The Knights of Honor v. Abbott.

W. D. Bynum, for appellant.

E. C. Buskirk and *P. W. Bartholomew*, for appellee.

WORDEN, C. J.—Action by the appellee against the appellant. Issue; trial; finding and judgment for the plaintiff.

The complaint alleges that “the defendant is a mutual, fraternal and benevolent order, incorporated by the Commonwealth of Kentucky,” (by an act) “approved March 20th, 1876, to promote benevolence, morality, science and industry throughout the United States. The objects of the said corporation are to unite fraternally all acceptable white men of every profession, business and occupation; to give all possible moral and material aid in its power to its members and those depending upon them; to promote benevolence and charity by establishing a widows’ and orphans’ benefit fund, from which, on satisfactory evidence of the death of a member of the corporation, a sum not exceeding five thousand dollars is to be paid to his family, or as he may direct; to provide for creating a fund for the relief of sick and distressed members, etc.; that by its constitution and by-laws (a printed copy of which is filed herewith, etc.,) the highest death benefit to be paid the family of a deceased member is two thousand dollars; that said association is a secret society, having three degrees, known as Infancy, Youth and Manhood; that the defendant herein is the supreme authority in said order, and has control of all the grand and subordinate lodges of the order as shown by its constitution and by-laws aforesaid; that the system of the order required that a person becoming a member, on receiving the degree of Manhood, should deposit the sum of one assessment with the financial reporter of his lodge, and that when a death occurred in the order, if there is less than two thousand dollars in the supreme treasury, an assessment is made upon the entire membership of the order throughout the United States; that said assessments are collected in the following manner, viz.: each subordinate lodge collects from each of its members in good standing the

The Supreme Lodge of The Knights of Honor v. Abbott.

assessment for the supreme lodge, and forwards the one in the treasury, within thirty days from the date of the notice of assessment, as its agent, to the defendant; that the defendant has exclusive control of said widows' and orphans' benefit fund, and each subordinate lodge acts as the agent of the defendant in all things relating to said widows' and orphans' benefit fund; that Wheatly Lodge, No. eight (8), Knights of Honor, of Indianapolis, Marion county, Indiana, is one of the subordinate lodges established by the defendant, and one of its agents in Indiana; that the defendant, among others, established and duly instituted Tennessee Lodge, No. twenty (20), at the city of Nashville, in the State of Tennessee, with all the rights and powers of all other subordinate lodges of the Knights of Honor; that on or prior to June 6th, 1876, one Levi Abbott, the brother of this plaintiff, joined said Tennessee lodge, No. 20, Knights of Honor, and became a member in good standing from that date until February 20th, 1880, when he died, being in good standing, having paid all his assessments and dues; that said Levi Abbott went by the name of Doc Abbott in his lodge, and they issued a certificate of membership to him as said Doc Abbott, of which the following is a copy:" (Here follows the copy.)

"That according to by-law No. 15 of the defendant, it is provided, in section two (2), that two thousand dollars shall be the highest amount paid by this order on the death of a brother. This sum shall be paid on the death of every full rate member, and one thousand dollars on the death of every half rate member; that said Levi Abbott was a full rate member. Law No. 22 of the defendant's constitution and laws, and section 4, provides as follows: 'Each applicant shall direct, in his application, to whom he desires his death benefit to be paid,' etc.; that said Levi (Doc) Abbott, in accordance with said law, directed his benefit to be paid to this plaintiff; that immediately after the said Levi (Doc) Abbott's death, the defendant was furnished by this plaintiff with notice of his (Levi's) death, and all the requirements of the de-

The Supreme Lodge of The Knights of Honor v. Abbott.

fendant as to proof of death, under the constitution and laws of said defendant, were performed and complied with; that the reporter of Tennessee Lodge, No. 20, of which Abbott was a member, forwarded immediately to the supreme reporter a notice of his (Abbott's) death, stating the name, age, date of death, time that he was raised to the third degree, or degree of Manhood, and the amount he had paid into the widows' and orphans' benefit fund, and that he was in good standing when he died, and that his brother, the beneficiary as aforesaid, was entitled to the whole amount of the benefit of the order, and giving the number of his certificate of membership." Here follow allegations of non-payment, etc.

The defendant demurred to the complaint for want of sufficient facts, but the demurrer was overruled. It then answered, first, by general denial; and, second, recapitulating and admitting most of the facts alleged in the complaint, but averring that "the plaintiff ought not to recover anything in this action, for the reason that long prior to the death of said Levi Abbott said defendant adopted as one of the laws and rules governing her and the subordinate lodges thereof, in the payment of assessments, an order that it should be the duty of each subordinate lodge, upon the receipt of a notice from the supreme reporter of an assessment, to cause the said assessment called for in the treasury to be immediately forwarded to the supreme treasury, and that any lodge failing, neglecting, or refusing to forward the same within thirty days from the date of said notice, should stand suspended, and that if a death should occur in said lodge during such suspension, no death benefit should be paid: Provided, that a member in good standing, holding an unexpired withdrawal card, should be exempt from said law, a copy of which rule and law is filed herewith and made a part hereof; that said rule and law, for more than a year immediately prior to, and at the time of, the death of said Levi Abbott, had been, and still was, in full force and effect.

"That on the — day of —, 1880, an assessment was

The Supreme Lodge of The Knights of Honor v. Abbott.

duly made by the supreme reporter of said defendant lodge, upon the subordinate lodges, and the one in the treasuries thereof called for; that notice of said assessment and call was duly given to said Tennessee Lodge, No. 20, of which said Levi Abbott at the time was a member, on the — day of —, 1880; that said Tennessee Lodge, No. 20, after the date and receipt of said notice, wholly neglected, failed and refused for the period of thirty days thereafter, to forward to the supreme treasurer the assessment, then in the treasury of said lodge and called, the same being assessment number 64; and at the expiration of said period, to wit, on the 17th day of February, 1880, said Tennessee Lodge was, by the rules and regulations of said order, suspended, and remained suspended continuously from that time until the 23d day of February, 1880; that said Levi Abbott died on the 20th day of February, 1880, during the time of the suspension of said Tennessee Lodge, of which he was a member; that at the time of his death said Levi Abbott did not hold from his said lodge any unexpired withdrawal card. Wherefore," etc.

To this paragraph of answer, the plaintiff demurred for want of sufficient facts, and the demurrer was sustained.

It is insisted by the appellant, that the complaint was bad, as not showing any cause of action against the appellant; that no action will lie against it to recover the money claimed, but that "the only remedy is by mandate against the supreme officers to compel them to issue an order against the fund for the amount due the plaintiff."

We, however, do not concur in that view of the question. The by-law number 15, as stated in the complaint, imposes on the appellant an obligation to pay the money as provided for therein, which may be enforced by an action against the appellant.

There are some other minor objections made to the complaint, which need not be specially noticed, as that it is uncertain in several respects. We think the complaint states substantially enough facts to entitle the plaintiff to recover,

The Supreme Lodge of The Knights of Honor v. Abbott.

and if there is any uncertainty in its allegations, a motion to require it to be made more certain would have remedied the defect.

We come to what seems to us to be the main question in the case, viz.: Was the second paragraph of answer good? We are of opinion that it was not, and, therefore, that the demurrer to it was correctly sustained.

The "order" made by the defendant, and relied upon as a defence, in relation to the forwarding of assessments by the subordinate lodges to the supreme treasury, provides that "any lodge failing, neglecting or refusing to forward the same within thirty days from the date of said notice, shall stand suspended, and that if a death occur in said lodge during such suspension, no death benefit shall be paid," etc.

This order contemplates the restoration of the delinquent lodge on the payment, after suspension, of the required assessment, for it prohibits the payment of benefits when death occurs *during such* suspension.

Now, the question arises, what is meant by the words, "if a death occur in said lodge during such suspension, no death benefit shall be paid?"

Is it meant by the provision to cut off absolutely, as forfeited, all right to death benefits of a member in good standing, who dies during the suspension of his lodge, and who was not in default in the payment of his dues or otherwise, because his lodge was in default at the time of his death, though his lodge afterwards pays up and is restored?

This would be a harsh construction, and one that can not be adopted, if the provision admits of any other reasonable interpretation. Forfeitures are not favored in law, and instruments will be so construed as to avoid them, if it can be done without doing violence to the language employed. See the case of *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 369, a case very much like the present.

We think the provision, fairly construed, means that where a death occurs during the suspension of the subordinate lodge,

Lindsey v. The State.

no death benefit shall be paid during such suspension, as if it had read as follows: "If a death occur in said lodge during such suspension, no death benefit shall be paid during such suspension."

This construction seems to us to be reasonable and well calculated to carry out the general purpose of the defendant's organization.

When a subordinate lodge is thus suspended, no death benefits are to be paid on behalf of members dying during the suspension. This is a strong incentive to the delinquent lodge to respond to the calls upon it and be restored. When restored, the rights to death benefits, which were suspended with the suspension of the lodge, are restored with its restoration.

The answer in question is clearly bad, inasmuch as it shows that the subordinate lodge, of which Levi Abbott was a member, was restored within a few days after his death.

A motion for a new trial was made on the ground that the finding was contrary to law, and not sustained by the evidence. The motion was correctly overruled.

The judgment below is affirmed, with costs.

10,245.

LINDSEY v. THE STATE.

CRIMINAL LAW.—*Sufficiency of Indictment.*—*Supreme Court.*—*Practice.*—

Waiver.—Where it is assigned, as error, that the indictment is insufficient, and no defects therein, either in form or substance, are indicated in the assignment, and the appellant's counsel does not, in his brief, allude even to the alleged insufficiency of the indictment, the Supreme Court will consider the supposed error to be waived and abandoned.

SAME.—*Prosecution of Infant.*—*House of Refuge.*—*Supreme Court.*—*Presumption.*—Where an infant, under the age of sixteen years, has been arraigned for a violation of any criminal law of this State, and it ap-

Lindsey v. The State.

pears that the trial court, under section 6214, R. S. 1881, has arrested the proceedings and committed the accused to the guardianship of the House of Refuge, the Supreme Court will presume, where the record shows nothing to the contrary, that this action was had with the consent of the accused.

SAME.—Motion for New Trial.—Exception.—Judgment.—Supreme Court.—Practice.—In criminal cases, it is cause for a new trial, that the verdict of a jury or finding of the court is contrary to law, under section 1842, R. S. 1881, and, unless the record shows that such cause was assigned in the motion for a new trial, the overruling of such motion, and an exception to the ruling, the question is not presented and will not be considered by the Supreme Court; nor will the court consider objections to the judgment, when the record fails to show that any objection or exception, either formal or substantial, was made to the judgment in the trial court.

• From the Hendricks Circuit Court.

G. Seidensticker, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *N. M. Butler*, Prosecuting Attorney, for the State.

Howk, J.—The indictment in this case charged the appellant, and one Henry Myers, with the crime of grand larceny. Upon arraignment, the appellant pleaded that he was not guilty as charged in the indictment. By agreement the cause was submitted to the court for trial, without the intervention of a jury; “and, after hearing the evidence and arguments of counsel, the court being fully advised in the premises finds the defendant guilty as charged in the indictment, and that said defendant is a person of the age of only fourteen years.” Whereupon the court assessed the appellant’s punishment, at commitment to the Indiana House of Refuge for juvenile offenders, until he was twenty-one years of age, unless sooner reformed; and the court rendered judgment in accordance with its finding.

From this judgment, the appellant has appealed to this court, and has here assigned the following errors:

“1. The finding and judgment of the court below are contrary to law;

“2. The judgment of the court below is contrary to law; and,

Lindsey v. The State.

“3. The indictment in the said cause, in the said court below, is insufficient.”

There was no motion by or on behalf of the appellant in the circuit court to quash the indictment in this case; but, in this court, he has assigned as error, that the indictment is insufficient. The assignment of error does not indicate any defects, either of form or substance, in the indictment, nor show wherein it is insufficient; and in his brief of this cause, the appellant's counsel has failed to allude even to the alleged insufficiency of the indictment. We may well conclude, therefore, as we do, that the third supposed error is not well assigned, and is waived or abandoned by the appellant, as a ground for the reversal of the judgment below.

The appellant did not move the court below for a new trial of this cause; nor did he there either object or except to any of the proceedings had, or to the form or substance of the judgment rendered. The evidence introduced on the trial is not in the record. We are of the opinion, therefore, that the record of this cause wholly fails to show, that either the finding or judgment of the court below was contrary to law.

In section 13 of the act of March 8th, 1867, “to establish a house of refuge for the correction and reformation of juvenile offenders,” as such section was amended by the act of December 10th, 1872, and now section 6214 of R. S. 1881, it is provided as follows:

“If any infant under the age of sixteen years shall be arraigned for trial in any court having criminal jurisdiction, on a charge of any violation of any criminal law of this State, the judge may, with the consent of the accused, arrest, at any stage of the cause, any further proceedings on the part of the prosecution, and commit the accused to the guardianship of this institution.”

It may be presumed that the judge of the trial court acted under and in accordance with the provisions of this section in committing the appellant in this case to the custody and guardianship of the House of Refuge. It is claimed by the ap-

Lindsey v. The State.

pellant's counsel, as we understand his argument, that the proceedings and judgment of the court below are erroneous, because they fail to show affirmatively the consent of the appellant thereto. We are not inclined, however, to adopt or approve of this view of the question. It seems to us that, in the absence of any showing in the record to the contrary, it must be presumed in favor of the action of the court below, that its proceedings and judgment were had and rendered, "with the consent of the accused," in conformity with the provisions of the statute.

We have considered the question discussed by the appellant's counsel, in this case, as if it had been properly presented for decision by the record before us and the errors assigned thereon. We are clearly of the opinion, however, that the appellant is in no condition to complain in this court of either the finding or judgment of the court below. In section 267 of the criminal code of 1881 (sec. 1842, R. S. 1881), it is provided that "The court shall grant a new trial to the defendant for the following causes, or any of them: * * * *Ninth.* When the verdict of the jury or the finding of the court is contrary to law or the evidence. The motion for a new trial must be made before the expiration of the term at which the judgment was rendered; and the grounds therefor must be in writing."

Under these statutory provisions, it is clear, we think, that the appellant can not be heard to complain in this court that the finding of the court below is contrary to law, when the record shows, as it does, that he had filed no written motion in that court for a new trial of the cause on that ground. Nor can he be heard to complain here that the judgment below is contrary to law when the record fails to show, as it does, that he either objected or excepted to the form or substance of such judgment. *Mountjoy v. The State*, 78 Ind. 172.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

DARR v. The State.

No. 10,180.

DARR v. THE STATE.

CRIMINAL LAW.—Notice of Appeal.—Statute Construed.—Under section 1887, R. S. 1881, service of the notice of an appeal to the Supreme Court upon the clerk of the court is required in cases in which the State appeals, but where the defendant appeals, service upon the prosecuting attorney alone is sufficient.

SAME.—Liquor Law.—Sale Without License.—Evidence.—Supreme Court.—Where, in a prosecution for a sale of intoxicating liquor without license, the evidence is conflicting, the Supreme Court will not disturb the verdict.

From the Blackford Circuit Court.

W. H. Carroll, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *C. W. Watkins*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution against John Darr, upon affidavit and information, for the sale of intoxicating liquor in a less quantity than a quart, to one Benjamin F. Jarrett, without a license authorizing such a sale.

Darr was found guilty and adjudged to pay a fine to the State. Having appealed to this court, he bases his appeal upon the assumed ground that the evidence was not sufficient to sustain the finding of the court.

The State has moved to dismiss the appeal, because it is not shown that notice of the appeal was served on the clerk of the court below, upon the theory that service of such a notice is still necessary in such an appeal as this, under the criminal code of 1881, under which this cause was tried.

Under the criminal code of 1852, it was necessary to serve notice of the appeal on the clerk, in all cases of appeal under its provisions, whether taken by the State or by the defendant. 2 R. S. 1876, p. 411, section 152; *Buskirk's Practice*, 417; *Winsett v. State*, 54 Ind. 437. But the code of 1881 is not so comprehensive in its provisions concerning appeals in criminal cases. Section 309 provides that "An appeal by the State is taken by the service of a written notice upon the clerk of

Darr v. The State.

the court where the judgment was rendered, stating that the appellant appeals to the Supreme Court from the judgment; and a similar notice must be served upon the defendant or his attorney; if neither can be found, then by posting up such notice three weeks in the clerk's office, in a conspicuous place. If the appeal is taken by the defendant, a similar notice must be served upon the prosecuting attorney." Acts 1881, p. 171.

It will thus be seen that service of notice upon the clerk is now only required in cases in which the State appeals, and that where the defendant appeals, service of notice upon the prosecuting attorney alone is sufficient.

There is a paper accompanying the transcript which shows that proper notice of this appeal was served upon the prosecuting attorney. The motion to dismiss the appeal is, consequently, overruled.

As to the evidence, the appellant's claim is that, taking it as a whole, it did not show a sale of less than one quart of intoxicating liquor at a time.

One witness testified that, at the time and place specified in the affidavit and information, he saw the appellant sell to Benjamin F. Jarrett one pint of whiskey for fifty cents.

On his cross-examination, this witness testified to facts tending to show a sale of whiskey at the same time to another person, but he did not either withdraw or modify his original statement as to having seen a sale to Jarrett of a quantity of whiskey less than a quart. Other and different descriptions of the same transaction were given by other witnesses, thus rendering the evidence simply conflicting as to the only material question in controversy at the trial.

Under such circumstances, we can not disturb the finding upon the evidence.

The judgment is affirmed, with costs.

Hays v. Wilstach.

No. 7977.

HAYS v. WILSTACH.

REAL ESTATE, ACTION TO RECOVER.—*Sheriff's Sale.—Mortgage.—Agreement.*

—*Evidence.*—Where to an absolute deed of lands there is a separate written defeasance, thus constituting a mortgage, *it seems* that parol evidence to show that the deed was intended to operate as a mortgage is not admissible, except in cases of fraud or mistake; and an agreement, made without the knowledge of a judgment plaintiff, between the judgment defendant and his vendee of the premises, that the vendee should assume the payment of plaintiff's claim, and allow defendant to remain in possession, and that a certain sum agreed upon as interest should stand instead of rent, is not competent evidence in a suit by an assignee of plaintiff, the purchaser at sheriff's sale, to recover possession from the defendant.

SAME.—*Trust and Trustee.—Mesne Profits.—Demand.—Ejectment.*—After a judgment foreclosing a mortgage of real estate, and before sale thereon the judgment defendant, by absolute deed intended to operate as a mortgage, conveyed the premises to P., who undertook to advance money to pay the mortgage debt and other debts of the judgment defendant, but of this the judgment plaintiffs had no notice. Subsequently, the land was purchased at sheriff's sale, upon the judgment, by the plaintiffs therein, and they then entered into a contract with P. for the sale of their certificate of purchase to him, receiving a sum of money in hand, and the sale to be effective upon the payment by him to them of the balance of their debt in certain instalments, and, for the purpose of carrying out this contract, the certificate was assigned to W. in trust, who had no notice of the contract between P. and the judgment defendant.

Held, that W. on receiving a sheriff's deed could maintain ejectment against the judgment debtor, and that demand of possession was not necessary.

Held, also, that mesne profits to the time of the trial could be recovered.

Held, also, that the rights of the judgment defendant against P. could not be interposed to defeat W. in a suit for possession and mesne profits.

SAME.—*Unrecorded Defeasance.*—An unrecorded defeasance is not notice to subsequent purchasers.

SAME.—*Notice.*—The continued possession by a judgment defendant of lands sold on execution against him, is not notice to the judgment plaintiff, or his assignees, that the right of possession is claimed or held in any other character than that existing at the time of the sale.

SAME.—*Agreement between Execution Defendant and Third Person.*—An execution defendant in possession can not make any agreement with a third person which will impair the rights of the judgment creditor.

SAME.—An execution defendant in possession can not contest the title of the judgment creditor's assignee.

SAME.—*Payment of part of Judgment.—Effect of.*—The rule that, where money is paid in redemption of lands sold upon execution, the holder of the

Hays v. Wilstach.

certificate can not take out a sheriff's deed, does not apply to a case where a third person agrees to buy the certificate and pays part of the agreed price therefor.

From the Tippecanoe Circuit Court.

E. H. Brackett, W. F. Hayes, J. A. Stein, J. R. Coffroth, T. A. Stuart, S. A. Huff and J. Park, for appellant.

D. Turpie, A. W. Reynolds, E. B. Sellers, J. A. Wilstach and J. W. Wilstach, for appellee.

ELLIOTT, C. J.—On the 10th day of May, 1870, appellant executed to John Richey a mortgage upon the real estate in controversy. Richey died in 1872, and the mortgage was foreclosed on the 9th day of May, 1876, at the suit of the heirs of Richey. The land was sold upon this decree on the 1st day of March, 1877, and was purchased by Alice L. Elliott and Keltie McCoy, the plaintiffs in the foreclosure proceedings. On the 13th day of September, 1876, one B. D. Pettit executed to the appellant an agreement reading as follows:

“BROOKSTON, September 13th, 1876.

“I hereby assume and agree to pay the sum of twenty-one thousand and eighty dollars as follows, to wit: The sum of fourteen thousand dollars to the heirs of John Richey; thirty-seven hundred and seventy-five dollars to the Second National Bank of Lafayette; fifteen hundred and six dollars to the Lafayette Savings Bank, and eighteen hundred dollars to George Chamberlain. Should Cormacan Hays pay me the above amounts, with the interest thereon at the rate of ten per cent. per annum, within three years from this date, or cause to be paid, I hereby bind myself, heirs and administrators to make the said Cormacan Hays a good and sufficient deed to a certain tract of real estate contained in a deed of said Hays and wife to Benjamin D. Pettit, dated August 1st, 1876.”

The deed referred to in this instrument was signed and acknowledged on the day named, but was not delivered until the 25th of the following month.

The purchasers at the sheriff's sale, Mrs. Elliott and Mrs.

Hays v. Wilstach.

McCoy, entered into an agreement with Pettit on the 7th day of April, 1877, wherein it was stipulated that the sheriff's certificate should be assigned in blank and placed in the hands of Chase and Wilstach as an escrow; that if the said real estate should be redeemed the redemption money should be paid in certain proportions to the parties to the contract; that if there was no redemption Pettit should, within a specified time, pay the amount due the owners of the certificate. On the 2d of March, 1878, a second agreement was entered into between the same parties, wherein it was provided that the time of payment should be extended and that the blank in the assignment of the certificate should be filled with the name of John A. Wilstach. The provisions of these instruments need not now be further noticed as it will be necessary to speak of them further on.

There is no evidence showing that either Wilstach or his assignors had any actual or express notice of the agreement between the appellant and Pettit.

We shall follow the order of discussion adopted by counsel, and consider and decide the questions in the order in which they are presented in argument.

In the course of his testimony the appellant said: "It was understood between us (Pettit and the witness), at the time, that I was to remain in possession, and that the ten per cent. interest which it was stipulated in the agreement I was to pay, should stand in the place of rent." On the appellee's motion the court ruled that the statement quoted should "be struck out for all purposes, except upon the single question whether the transaction between said Hays and said Pettit amounted to a mortgage or not." Appellant has no reason to complain of this ruling. If there was error it was in his favor. The admission of oral testimony to prove that a deed absolute on its face is a mortgage constitutes a marked exception to the general rule forbidding the contradiction of written instruments by parol evidence. The testimony in this instance could not have been competent for any other

Hays v. Wilstach.

purpose than that of proving the deed to be a mortgage. We do not mean to say that it was admissible for that purpose in a case such as this, where the deed and the defeasance have been reduced to writing. We are strongly inclined to the opinion that where both the conveyance and the stipulations are embodied in written instruments, oral testimony is not competent, except in cases of fraud or mistake.

The proposition which counsel next discuss is, that the court erred in allowing mesne profits up to the time of the trial. There was no error in this. Our own cases declare the rule to be that, in actions for the recovery of the possession of real estate, the mesne profits up to the day of the trial may be allowed as damages. *Pendergast v. McCaslin*, 2 Ind. 87. The old, common-law doctrine was, that only nominal damages could be recovered in an action of ejectment, but this rule has been changed by statute. *Woodruff v. Garner*, 27 Ind. 4 (*vide* opinion p. 8). The common-law authorities upon this subject do not apply to actions for the recovery of real property brought under our statute.

A judgment plaintiff is not bound to take notice of rights acquired by a judgment debtor, subsequent to the judgment. The fact that the judgment debtor is in possession is not notice that he has acquired any new or additional right or interest in the land since the sheriff's sale. There are some cases where possession is notice, but the continued possession by a judgment defendant of lands sold upon execution against him, is not notice to the judgment plaintiff, or his assignees, that the right to possession is claimed or held in any other character than that existing at the time of the sale.

Neither Wilstach nor the assignors of the sheriff's certificate were bound to take notice of the agreement between Hays and Pettit. If they were bound to look to the record at all, they would have found that Pettit held the land by an absolute deed. This would have been the extent of the knowledge which they could have acquired, and they were not bound to

Hays v. Wilstach.

look further or make inquiry elsewhere. An unrecorded defeasance is not notice. *Tuttle v. Churchman*, 74 Ind. 311.

We can not perceive, therefore, how the appellee could have been affected by the agreement between Pettit and Hays.

If it were conceded that the appellee or his assignors had knowledge of this agreement, it would not have affected their rights. The execution debtor could not make any agreement with third persons which would impair the rights of the judgment plaintiffs. No matter what agreement was made between Hays and Pettit, the judgment plaintiffs had a right to enforce their judgment. They had done nothing impairing their rights. Their judgment was not weakened by Pettit's agreement to pay it. Until they assented to the agreement, they were in no wise parties to it. But they never did assent to it, for they never had any knowledge of its existence.

We are not required to enquire into the relationship between Hays and Pettit, for what they did, or agreed to do, could not impair the rights of the appellee, unless he or his assignors had notice of their relationship or agreement. Whether the contract between appellant and Pettit made the latter a trustee or a mortgagee, is not here the question. The question here is, what are the legal rights of the judgment creditors of the appellant?

The appellant is not in a situation to contest the right of appellee to maintain this action. The legal title is in the latter. It is not important to the appellant whether the appellee has or has not anything more than the mere legal title. It is the duty of a judgment debtor to surrender possession to the judgment plaintiff or his assignee. It is not for the debtor to contest the right of an assignee holding the legal title by the voluntary assignment of the judgment plaintiff. *Turner v. First Nat. Bank, etc.*, 78 Ind. 19.

It is not necessary for the plaintiff in an action for the recovery of real property purchased at sheriff's sale to make a demand of the judgment debtor for possession. It is the duty

Hays v. Wilstach.

of the debtor to surrender possession at the expiration of the year allowed for redemption, without any demand.

An agreement between the execution defendant and a third person, of which the execution plaintiff has no notice, can not change the nature of the debtor's possession in such a manner as to impose upon the execution creditor the burden of making a demand before instituting his action for possession. The agreement between appellant and Pettit had not the effect to change the former's possession from that of an execution defendant into that of a mortgagor or equitable owner as against the execution plaintiff. Whatever may have been the effect of the agreement between appellant and Pettit, the assignors of the appellee were not in any manner affected by it, for they had no notice of its existence.

In a supplemental brief, counsel for appellant argue that as the execution plaintiffs and owners of the sheriff's certificate had accepted part of the money due upon the judgment they had waived their right to hold the property as purchasers. It is decided in *Hughart v. Lenburg*, 45 Ind. 498, that where part of the money due upon the judgment is accepted by the holder of the certificate in redemption of the land, he cannot hold the land as a purchaser, but holds a mere lien upon it for the amount of the judgment remaining unpaid. This we regard as the correct rule. It must be borne in mind, however, that this rule applies only where the money is paid upon the judgment, or for the purpose of redeeming the property.

The rule that where there has been an acceptance of redemption money, the holder of the certificate loses his character of purchaser, does not extend to cases where a third person pays money, not for the purpose of redeeming, but for the purpose of becoming the owner of the certificate, or of acquiring the title to the land. The holder of the certificate has a right to sell it, and to sell upon such terms as he chooses. He may sell all or a part of his interest. He may provide for the payment of the agreed price as he deems best. If the execution defendant is not a party to the agreement, he can

Hays v. Wilstach.

not derive benefit from it to the prejudice of the rights of the owner of the certificate.

The transaction between Pettit and the assignors of the appellee must be regarded as a conditional sale of an interest in the certificate issued to them by the sheriff. In order to exhibit, with sufficient definiteness the transaction between the parties named, it is necessary to state some of the provisions of the agreement of which an outline has been given. This agreement recites the amount due upon the judgment; that Pettit has paid to the holders of the certificate \$4,542.24, and provides that in case the land is redeemed Pettit shall receive the proper proportion of the redemption money, and the other parties the residue. It is further provided, that in case there is no redemption, Pettit shall be allowed a certain time in which to pay the amount due upon the judgment, and that the certificate of sale shall be assigned in blank and delivered to Chase and Wilstach, as an escrow; and it is also provided that upon the payment of certain designated sums, and the execution of notes and mortgage, the assignment of certificate shall be filled up, with the name of Benjamin D. Pettit in such a manner as to entitle him to receive a deed. In an agreement subsequently made the time of payment was extended, and it is recited that "It is supposed that such an extension will give time for the prosecution of a suit for the possession of said lands by John A. Wilstach, trustee, but the said payments are to be made promptly as they may mature, without any delay occasioned by the pendency of any such suit. At the close of said suit Wilstach is to convey to said Pettit, or his assigns, upon payment of all payments due, and executing notes and a first mortgage on said premises, securing such portion of said payments as may then remain unpaid. This instrument also provided that the blank in the assignment should be filled with the name of John A. Wilstach, trustee. Taking the provisions of these instruments together, it is very evident that Pettit did not intend to redeem, nor the appellee's assignors to accept any money in

Hays v. Wilstach.

redemption of the lands. It is equally clear that the owners of the certificate neither meant to nor did surrender their right to enforce their judgment to Pettit, or to any one else. They retained this right, and the execution debtor can not retain possession, because they sold, or agreed to sell, an interest in the certificate. Nor can the fact that they agreed that the trustee should, after a certain time and upon the performance of certain acts, convey the legal title to Pettit, enable the appellant to hold possession against their assignee or grantee.

If it were granted that Pettit was the trustee of appellant, and that all bargains made by him must enure to appellant's benefit, still the appellee would have a right to recover possession as the trustee of the holders of the title conveyed by the sheriff's deed. The appellee can not be defeated because appellant has a legal or equitable claim against Pettit. The question is a very different one from what it would be in an action by or against Pettit. That the appellant has some right in the land as against Pettit is clear enough, but his right against Pettit will not enable him to defeat the appellee. Appellant can not use his right against Pettit to secure his possession against his judgment creditors, seeking to enforce a right vested in them by the sheriff's sale. The question here is, what are the rights of the appellee against the appellant, not what are the rights of the appellant against Pettit?

Appellee does not hold the title for Pettit. The execution plaintiffs were the owners of the certificate, and they transferred it to Wilstach, for the purpose of carrying into effect a conditional sale of the certificate; but they retained the equitable right and estate. Until the full amount of the purchase-money has been paid or secured, the trustee has no right to convey. The beneficial interest remains in them. If Pettit fails to pay as agreed, the original holders of the certificate become owners of the whole interest, for they do not agree to make him the owner until he has paid the full consideration. Wilstach is their trustee. They had the power

Lamson et al. v. First National Bank of Vevay.

of appointment, not Pettit, and they exercised this power for their own use and benefit.

If it were fully and broadly conceded that Pettit was appellant's trustee, and that appellant had full power to compel the appellee to do for him what his assignors had agreed to do for Pettit, still the appellant can not defeat this action. If he has all the rights that Pettit has, he takes them burdened with the same conditions. These conditions would have required Pettit, had he sought to enforce the agreement, to perform, or offer to perform, all that he had agreed to do. The appellant can not, even upon his own theory, succeed without tendering performance of that which the person through whom he claims had undertaken to perform.

The transaction between Pettit and the appellee's assignors gave the appellant no rights against them. Towards them his relation of judgment debtor remains unchanged. He can not use his rights against Pettit, whatever they are, to defeat the enforcement of the right conferred by the sheriff's sale. In an action between him and Pettit, the inquiry as to the character and extent of appellant's rights against Pettit will be a material and controlling one. It is not relevant or material in the present controversy between appellant as judgment debtor and the appellee as representative of his judgment creditors.

Judgment affirmed.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 8232.

LAMSON ET AL. v. FIRST NATIONAL BANK OF VEVAY.

DECEDENTS' ESTATES.—*Costs.*—*Statute Construed.*—*Action against Executor or Administrator and Co-obligor.*—A joint suit against an administrator or executor and the co-obligor of the deceased, upon a joint or joint and several obligation, is governed in respect to costs by the rules of the code, and not by section 62 of the decedents' estates act. 2 R. S. 1876, p. 512.

Lamson *et al.* v. First National Bank of Vevay.

PRINCIPAL AND SURETY.—*Extension of Time.*—*Notice.*—An extension of time by agreement with the principal debtor does not discharge a surety, unless the suretyship be known to the holder of the obligation.

SAME.—*Burden of Proof.*—The surety who alleges an extension of time, without his consent, must allege and prove that the holder of the obligation had notice of the suretyship.

SUPREME COURT.—*Evidence.*—This court will not disturb a verdict for lack of evidence, if supported by some evidence, especially when against the party who had the burden of the issue.

From the Switzerland Circuit Court.

L. O. Schroeder, T. Livings and W. D. Ward, for appellants.
W. R. Johnson and F. M. Griffith, for appellee.

WOODS, J.—Appeal from a judgment on a promissory note. The appellant Mary A. Mennet, administratrix of the estate of Francis E. Mennet, answered separately to the claims of the plaintiff to recover costs and attorney's fees, admitting the execution of the note by her intestate as surety for one of the other makers, but alleging her appointment and qualification as administratrix, and that the suit was not commenced within one year from the date of such appointment.

The argument in support of these pleas is based on section 62 of the act for the settlement of decedents' estates, 2 R. S. 1876, p. 512. That section, however, is not applicable. It provides for the filing of claims against estates in the court of probate jurisdiction, and that this must be done "within one year from the date of the first appointment of an executor or administrator therein, and notice thereof; or no cost shall be recovered," etc.; but this has no reference to actions against an administrator or executor, when sued jointly with others, who were co-obligors of the deceased, upon joint or joint and several contracts. Such suits may be brought in any court wherein the parties, if all living, might be sued, and, in respect to costs, are governed by the ordinary rules. The pleas, however, are bad, even if the section applied, because they do not show notice of the appellant's appointment.

The said administratrix also complains of the overruling of her motion for a new trial.

One of her defences to the action was that her intestate signed the note as surety, and that since his death the plaintiff had accepted, of the principal debtor, interest in advance upon the note, without her knowledge or consent, whereby the estate was discharged. It was clearly proven that such payments of interest in advance were made, and accepted by the plaintiff, and that the deceased was surety only, but there is no direct proof that the plaintiff had knowledge of the suretyship. The appellant insists that, once the suretyship and the agreement for the extension of time were shown, the burden was on the plaintiff to show ignorance of the intestate's relation to the paper; and that, if this be otherwise, there is, in the record, sufficient uncontradicted evidence of notice. It was necessary for the appellant to aver, as in the fourth and fifth paragraphs of her answer she has averred, the plaintiff's knowledge of the fact of suretyship. *Davenport v. King*, 63 Ind. 64; *McCloskey v. I. M. & C. Union*, 67 Ind. 86. And the case is not an exception to the rule that the burden of proof and of averment is upon the same party. *Arms v. Beitman*, 73 Ind. 85; *Mullendore v. Wertz*, 75 Ind. 431.

There are some circumstances in proof which might be regarded as indicating notice to the appellee of the alleged suretyship, and, besides the fact that the note on its face showed all of the makers to be bound alike, there is evidence of one fact which tended to the conclusion that the deceased was himself the borrower, namely, that he went to the bank and made arrangement for obtaining the money, before any application therefor was made by the one for whose benefit it was actually obtained. Remembering that the burden of proof was on the appellant, the case is not one in which we can review the finding of the trial court on a question of fact. *Johnson v. Burns*, 80 Ind. 130.

The court did not permit an answer to a question propounded by appellant to a witness; but there was no error in this, if for no other reason, because no statement was made of the answer expected.

Powell v. Clelland.

The appellee has filed in this court a remittitur of \$33.50, the amount of the attorney's fee allowed by the court, admitting that there was no proof to sustain the finding in that particular. On condition that a like remittitur or credit as of the date of the judgment be made in the court below within sixty days, the judgment will be affirmed, at the costs of the appellee.

No. 9219.

POWELL v. CLELLAND.

DRAINAGE.—Estoppel.—Collateral Attack.—Where a drain is established pursuant to the act of 1867, Acts 1867, p. 186, a party to the proceedings, having notice and being assessed for the construction thereof, can not maintain a suit for injury to his land thereby, or by reason of its construction thereon. He is bound by the proceedings before the county commissioners, unless appealed from, and can not attack them collaterally.

From the Howard Circuit Court.

J. F. Elliott and L. J. Kirkpatrick, for appellant.

J. O'Brien and M. Garrigus, for appellee.

BICKNELL, C. C.—The first paragraph of the appellant's complaint charged that the appellee unlawfully entered upon plaintiff's land, and there dug a ditch.

The second paragraph charged that the plaintiff had an open ditch, into which he drained his land by tiles, and that defendant wrongfully dug another ditch, opening into the plaintiff's ditch, and thereby overflowed plaintiff's land.

The answer alleged that the defendant filed, pursuant to sections 1 and 2 of the act of March 11th, 1867, his petition before the proper county board, for the establishment of a ditch, which is the same ditch mentioned in both paragraphs of the complaint.

That the county board took jurisdiction of the petition, and determined that said ditch was of public benefit and utility,

Powell v. Clelland.

and would promote the public health, and that they established said ditch, and appointed appraisers to assess benefits and damages as required by said act.

That the plaintiff was a resident of said county, and was personally served with notice of the time and place of meeting of said appraisers for the purpose of such assessment, which notice contained a description of the proposed work, and the beginning and ending, and general course thereof, and the names of the owners of the lands through which the ditch would pass, and which would be affected thereby.

That due service of said notice was proved by affidavit, and the proof filed with the county auditor.

That said appraisers met at the time and place named in said notice, to wit, at the point of beginning of said work, and made such assessment, and filed the same, duly sworn to, in the recorder's office of said county, and the same was there duly recorded.

That no lands were damaged by said ditch, but plaintiff's land was benefited thereby in the sum of fifteen dollars, which was assessed by said appraisers, but was never paid by the plaintiff.

That said ditch was made according to the specifications of said petition, and was completed before the commencement of this suit, under the authority of the said county board, and no other ditch was ever made by defendant on plaintiff's land.

That plaintiff had due notice of said petition, and has not appealed from the proceedings thereon, nor contested them in any way, but stood by while said work was done on his land, and made no objection thereto.

That said ditch is not deeper than is necessary to drain defendant's land to the depth of six feet at the lowest point, and the fall therein is not more than at the average rate of twelve feet per mile upon each owner's land.

A demurrer to this answer was overruled; judgment was rendered upon the demurrer in favor of the defendant. The plaintiff appealed. The only error assigned is, overruling said demurrer.

Powell v. Clelland.

The appellant claims that the proceedings set forth in the answer are void for irregularity ; that they are not in accordance with the provisions of the act of March 9th, 1875, 1 R. S. 1876, p. 428. It is true, they are not ; they show proceedings under the act of March 11th, 1867, Acts 1867, p. 186, which, the appellant claims, has been repealed by implication by the act of 1875.

The act of 1867 was not repealed by the act of 1875 ; section 22 of the latter act provides that said act of 1875 shall not "repeal any law of this State now in force to encourage the construction of levees, dikes and drains, and to enable the owners of wet lands to drain and reclaim the same, but such shall be in addition thereto."

This court has held that section 20 of the act of 1875 repeals by implication section 13 of the act of 1867, and that these two acts must be construed together, and that, so construed, the act of 1867 is constitutional. *Chambers v. Kyle*, 67 Ind. 206.

In the case of *Deisner v. Simpson*, 72 Ind. 435, it was held that in all cases where the provisions of the two acts are in conflict and can not be reconciled, the act of 1875, being the later law, must govern, and that a proceeding under the act of 1867 must so far conform to the act of 1875, as to show that the proposed ditch will be conducive to the public health, convenience or welfare, or will be of public benefit or utility. The answer in controversy shows proceedings in accordance with the act of 1867, and also shows that the proposed ditch would be of public utility and would promote the public health, and that the county board so determined and established the ditch, which was made according to the order of said county board. Therefore, the following language of this court in *Chambers v. Kyle*, *supra*, is exactly in point in this case: "It was a final proceeding, in a competent court having jurisdiction over the subject-matter and over the parties to the record. Such proceedings can not be attacked collaterally, though they might have been reversed on appeal.

Powell v. Clelland.

If the appellee was injured by the proceedings, to which he was a party, and of which he had notice, he should have appealed therefrom ; not having done so, and the proceedings not being void, he is bound by the judgment." See also *Muncey v. Joest*, 74 Ind. 409.

The proviso in section 10 of the act of 1875 gives a general right of appeal from orders of a county board made under any section of that drainage law. *Houk v. Barthold*, 73 Ind. 21. The answer under consideration avers that the county board established the ditch ; an order establishing a ditch is a decision from which the aggrieved party may appeal. 1 R. S. 1876, p. 357, section 31. Naming the owner in the assessment makes him a party to the proceeding, so that although not named in the petition, he may appeal from the proceedings. *Houk v. Barthold*, *supra*. The answer also avers that the appellant never appealed from the proceedings, nor contested them in any way, but stood by while the ditch was dug through his land and made no objection thereto.

Upon this the following language of this court is in point : " It is a well settled rule of equity, that if a party is guilty of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief. The rule is more especially applicable to cases where a party, being cognizant of his rights, does not take those steps to arrest them, which are open to him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character." *Muncey v. Joest*, *supra*. When a new ditch has been established, opening into an old ditch, and the water discharged by the new ditch can not be carried off by the old ditch without a too frequent overflow of the adjoining lands, it then becomes the duty of the builders of the new ditch to widen and deepen the old ditch, so as to provide for the increased waterflow, and in case of their failure or refusal so to do, they become liable under section 12 of the act of 1867, *supra*, to the owners of land along the line of the old ditch, for all damages they may sus-

Hill v. Perry *et al.*

tain in consequence of such increased waterflow, with ten per centum thereon and costs of suit. There was no error in overruling the demurrer to the answer. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things affirmed, at the costs of the appellant.

No. 9139.

HILL v. PERRY ET AL.

VERDICT.—*Special Finding.*—A motion for judgment, upon the special findings of the jury, *non obstante veredicto*, can not be sustained, where no fact is found inconsistent with the general verdict.

SAME.—*Liquor Law.*—*Application for License.*—*Remonstrance.*—*Interrogatories.*—Where an application is made to obtain a license to retail intoxicating liquor, to which a remonstrance is filed on account of the alleged immorality and other unfitness of the applicant, and upon such issue the jury return a general verdict for the remonstrators, with answers to interrogatories that the applicant is a resident of the State, is of proper age and not in the habit of becoming intoxicated, such facts so found are not inconsistent with the general verdict, as that in effect finds that the applicant is an immoral man, and unfit to be entrusted with a license.

SAME.—*Burden of Proof.*—*Open and Close.*—In such proceeding, the burden of the issue is upon the applicant, and the refusal of the court to award him the opening and close of the argument is such error as will reverse the judgment against him.

From the Bartholomew Circuit Court.

J. B. Brown, for appellant.

F. T. Hord and W. B. Hord, for appellees.

BEST, C.—Application of appellant, under the act of March 17th, 1875, to obtain license to sell intoxicating liquors. A remonstrance by John L. Perry and sixty other persons was filed against the application. The application was heard and denied by the county commissioners. The applicant appealed

Hill v. Perry *et al.*

to the circuit court, the case was tried by a jury, a verdict, with answers to interrogatories, was returned against him, a motion for judgment upon the answers to interrogatories, notwithstanding the general verdict, and a motion for a new trial, were overruled, the license refused and the application dismissed.

The errors assigned are that the court erred in refusing to render judgment upon the answers of the jury to the interrogatories, and in overruling the motion for a new trial.

The statute provides that when an application is made for a license to retail intoxicating liquors, "it shall be the privilege of any voter of said township to remonstrate, in writing, against the granting of such license to any applicant, on account of immorality or other unfitness, as is specified in this act." Acts 1875, Spec. Sess., page 56.

Under this section of the statute, the remonstrators filed a remonstrance in writing, alleging that the appellant is an immoral man; that he sells intoxicating liquors to minors and to persons in a state of intoxication; that he sells intoxicating liquors on Sunday, keeps a gambling house, and keeps his house, where intoxicating liquors are sold, in a disorderly manner.

Upon the issues thus formed, the jury returned the following verdict and answers to interrogatories:

"We, the jury, find for the remonstrators, and that the applicant, Finley P. Hill, is not entitled to said license.

"WM. PHELPS, Foreman."

"The jury will answer each of the following interrogatories, and have the foreman sign each separately:

"1st. Did Finley P. Hill keep a saloon where intoxicating liquors were sold in the months of July, August and September, 1879, in Jonesville, Bartholomew county, Indiana, in a disorderly manner?

"Ans. He did.

"2d. Did Finley P. Hill sell intoxicating liquors at Jonesville, Bartholomew county, Indiana, for himself and in his

Hill v. Perry *et al.*

own name, in less quantities than a quart at a time, to be drank on the premises, without a license?

"Ans. Yes.

"3d. Did Finley P. Hill himself, and for himself, sell or give intoxicating liquors to a minor or minors?

"Ans. Yes.

"4th. Did Finley P. Hill himself have the right to prevent, and yet permit, persons to engage in games at cards, or pool, upon wager of a valuable consideration, upon premises over which he had control?

"Ans. Yes.

WM. PHELPS, Foreman."

"The jury will answer each of the following interrogatories, and the foreman will sign each separately:

"1st. Is the applicant, Finley P. Hill, a man of good moral character?

"Ans. Not sufficient to be intrusted with a license to sell intoxicating liquors.

"2d. Is the applicant, Finley P. Hill, in the habit of becoming intoxicated?

"Ans. No.

"3d. Is the applicant a male inhabitant of the State of Indiana, over the age of twenty-one years?

"Ans. Yes.

WM. PHELPS, Foreman."

Waiving the question whether or not these interrogatories and the answers thereto are properly a part of the record, we think, thus considered, that the court did not err in overruling the motion of appellant for a judgment thereon in his favor. The general verdict found, in effect, that the appellant was an immoral man, and not fit to be trusted with a license to retail intoxicating liquors, for the reasons alleged in the remonstrance. The answers to the interrogatories establish no fact inconsistent with this finding. The only facts found in favor of the appellant are, that he was an inhabitant of the State, over twenty-one years of age, and was not in the habit of becoming intoxicated. These facts did not entitle him to a license, if he was an immoral man, and was unfit to be

Hill v. Perry *et al.*

trusted with such license. Again, the application was made in September, 1879, and the trial did not occur till February, 1880. The issues involved the fitness of the applicant at the time the application was made, and the answers to the interrogatories do not show that the applicant was over twenty-one years of age, or a resident of the State at that time. If not, he was not entitled to a license. The facts found are not inconsistent with the general verdict, and, therefore, there was no error in overruling the motion for judgment, notwithstanding the general verdict.

The motion for a new trial embraced a great many reasons, and among others it is insisted that the court erred in awarding the open and close of the argument to the appellees.

The record discloses the fact that this was done. The party upon whom the burthen of the issues rests is entitled to open and close the argument. *Rothrock v. Perkinson*, 61 Ind. 39; *Hyatt v. Clements*, 65 Ind. 12.

In a proceeding to obtain a license to retail intoxicating liquors, the burthen of the issue is upon the applicant, as was decided in *Goodwin v. Smith*, 72 Ind. 113.

The refusal of the court to allow the appellant to open and close the argument before the jury, was such error as must reverse the case.

We can not, as is suggested by the appellees, say that this error did not injure the appellant. There are some other reasons urged for a new trial, but we do not deem it necessary to examine them. For the error in awarding the open and close in the argument to the appellees, the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellees' costs, with instructions to grant a new trial.

Pattison *et al.* v. Shaw.

No. 8614.

PATTISON ET AL. v. SHAW.

EVIDENCE.—*Execution of Lost Note.*—*General Denial Not Verified.*—*Non-Payment.*—On trial of an action upon a promissory note alleged to have been lost, due and unpaid, the plaintiff, to sustain the issue formed by the general denial, not verified, is not required to prove the execution of the note, or his allegation that it is unpaid.

SUPREME COURT.—*Practice.*—*Motion to Dismiss Appeal.*—*Diligence.*—A motion in the Supreme Court to dismiss an appeal because not prosecuted with diligence can be made only on call in open court.

From the Delaware Circuit Court.

C. E. Shipley, W. A. Thompson, A. O. Marsh and J. W. Thompson, for appellants.

I. P. Gray and P. Gray, for appellee.

MORRIS, C.—The appellants commenced this suit against the appellee, in the Randolph Circuit Court. The cause was removed into the Delaware Circuit Court by change of venue.

The complaint states that, on the 8th day of November, 1876, the appellee being indebted to Hibben, Pattison & Co., a firm composed of the appellants and one Hibben, executed to them his note, due at forty days, for \$151.16, with ten per cent. interest and attorney's fees; that Hibben had died, and the note had been lost. A copy of the note is filed with the complaint. It is also alleged that the note is due and unpaid. The appellee answered by a general denial, not under oath. He also filed an answer alleging payment. The appellants replied to the second paragraph of the answer by a denial. The cause was submitted to a jury for trial, who found for the appellee.

The appellant moved the court for a new trial, on the ground, among others, that the court erred in giving, of its own motion, charges numbered from one to seven, inclusive. The court overruled the motion for a new trial, and rendered final judgment in favor of the appellee.

The error assigned is the overruling of the motion for a new trial.

Pattison et al. v. Shaw.

The appellee filed a motion to dismiss the appeal for the failure of the appellants to prosecute the same with proper diligence. Such a motion can only be made on call in open court. The motion in this case was not so made, and must, for this reason, be overruled.

Counsel for the appellant say that they only care to urge objections to the charges of the court to the jury.

The court gave, among others, the following charges to the jury :

1. "The complaint alleges that, on the 8th day of November, 1876, the defendant, being indebted to the plaintiffs in the sum of \$151.16, did, on said day, execute his promissory note to the plaintiffs for that amount, payable forty days after date, with interest at ten per cent. after maturity, waiving valuation and appraisement laws, and five per cent. attorney's fee, waiving valuation and appraisement laws. A copy of the note is set out and made a part of the complaint. The plaintiffs aver that the note has been lost; that the same remains due and is unpaid. They demand judgment. To this complaint the defendant has filed his answer. The first paragraph is a general denial; the second paragraph is a plea of payment. The plaintiff replies to the second paragraph by a general denial. The complaint, answer and reply form the issues in this case, which you are to try."

2. "The general denial filed by the defendant puts in issue the averments of the complaint, and the burden of proof of this issue is upon the plaintiffs, and, to entitle them to recover, they must prove all the material allegations of the complaint. They must prove the execution of the note described in the complaint by the defendant, payable to the plaintiffs; the proof must show that the note executed corresponds in amount and date and time when due and the terms of payment, in all particulars, with the copy set out in the complaint. The plaintiffs must further prove the loss of the note; that the same was due at the commencement of this suit, and that it remains

Pattison *et al.* v. Shaw.

unpaid. If all of these facts have been proven, by a fair preponderance of the evidence, then the plaintiffs are entitled to recover, unless the defendant has, by a fair preponderance of the evidence, proven that the note was fully paid, as he alleges in his second paragraph of his answer."

The above charge is not modified by any of the other charges given to the jury.

The general denial filed by the defendant, not having been verified, admitted the execution of the note sued on. Under this issue the appellants had to prove, in order to excuse the non-production of the note upon the trial, its existence, terms and loss. Upon such proof, they would, under the issues, and in the absence of proof of payment, be entitled to recover without proving that the appellee had executed the note, the existence, terms and loss of which had been established. It was error, therefore, to charge the jury as the court did, that the plaintiffs must prove the execution of the note. In the case of *Millikan v. State, ex rel. Bishop*, 70 Ind. 310, 313, Howk, J., says: "Under the issues, the existence, loss and contents of the bond in suit were necessary facts to be established by the relators, by a fair preponderance of the evidence. The execution of the bond was not put in issue by an answer under oath; and if the evidence offered by the appellants would have proved, or tended to prove, nothing more than the mere non-execution of the bond, it would of course have been immaterial."

We think the instruction was wrong in another respect. After stating to the jury that the appellants must prove the execution of the note, its contents and loss, precisely and in every respect as alleged, the instruction adds that the appellants must also prove that the note remains unpaid. From the manner in which the charge is drawn, the jury would be likely to understand the charge as meaning that, after the appellants had proven the existence, contents and loss of the note, they must, in order to make out a case, produce evidence of the non-payment of the note. Upon proof of the

 Stayner v. Joice *et al.*

existence of the note, its contents and loss, the appellants were entitled to recover, unless payment was proved by the appellee. The burden of the issue as to payment was upon the appellee, not upon the appellants. We think that in this respect the charge was faulty and misleading. The judgment below should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee.

Opinion filed at November term, 1881.

Petition for a rehearing overruled at May term, 1882.

No. 8788.

STAYNER v. JOICE ET AL.

JUDGMENT.—*Complaint to Review.*—A complaint to review a judgment must be tried by the record, and must disclose such error therein as would be good ground for a reversal by the Supreme Court.

SAME.—*Promissory Note.—Material Alteration.—Evidence.*—A complaint for the review of a judgment, because of a material alteration of the promissory note sued on, which contains uncontradicted evidence in support of plaintiff's verified answer of *non est factum*, is sufficient on demurrer.

PROMISSORY NOTE.—*Alteration.—Surety.—Discharge.*—A material alteration in a note made after it has been signed by the surety, and before delivery, without his knowledge or consent, invalidates the note as to him, and the changing of the time of payment from "one day" to "one year" after date is such alteration as will discharge the surety.

From the Steuben Circuit Court.

R. W. McBride, for appellant.

J. A. Woodhull and W. G. Croxton, for appellees.

FRANKLIN, C.—Appellant filed a complaint to review a judgment in favor of appellee Joice, rendered against him and appellee Zephaniah B. Stayner, on a promissory note.

Stayner v. Joice *et al.*

The complaint is for errors of law apparent upon the face of the record of the proceedings and judgment.

The error assigned in this court is the sustaining of a demurrer to the complaint. The error assigned in the complaint is the overruling of appellant's motion for a new trial. The reasons assigned for a new trial are that the finding was not sustained by sufficient evidence, and was contrary to law.

The case appears to have been prepared for an appeal to this court from the original judgment, but instead of filing the transcript in this court, appellant commenced this suit in the court below to review the judgment, and has appealed in the latter proceeding.

A bill of review for error of law appearing in the proceedings and judgment can not be sustained, unless the error assigned is apparent on the face of the record, and is such that the Supreme Court would reverse the judgment on appeal. And in a complaint for review for errors apparent in the record, no issuable fact can be presented. *Richardson v. Howk*, 45 Ind. 451; *Buskirk's Practice*, 271.

The evidence given at the original trial, by bill of exceptions, is in the record which is made a part of the complaint to review. And as to whether the finding was contrary to law, depends upon the uncontradicted facts proven.

The issue upon the trial was upon appellant's verified answer of *non est factum*.

The note upon its face shows changes by erasures and interlineation, as is shown by the following copy:

"\$149.11. ORLAND, INDIANA, October 24th, 1873.

year

"One ~~day~~ after date, we promise to pay to the order of William S. Joice one hundred forty nine and $\frac{11}{100}$ dollars, value received, without any relief from valuation or appraisement laws, with ten per cent. interest ~~after maturity.~~

"ZEPH. B. STAYNER,

"JESSE STAYNER."

The evidence shows that the note was written by one Fox, who was attending to business for appellee Joice, and handed to appellee Zephaniah B. Stayner to procure some one as surety; that Joice had promised him a year's time if he would secure it; that appellant signed it in the absence of the payee or his agent, and left it with the principal to be delivered; that there was no alteration in it at the time it was signed by him; that the change was afterwards made without his knowledge or consent; that when the note was delivered to appellee Joice, it had been changed, as it now appears. There is no conflict in the testimony as to the foregoing facts. There is a conflict as to whether the note was changed by Zephaniah B. Stayner, the principal, or one Fox, acting for Joice, the payee, with the principal's consent, before it was delivered to Joice. But this is immaterial; the fact existed that the note was changed after it was delivered to appellee, without the knowledge or consent of either of them. There can be no question as to the materiality of the change. When the note was delivered to appellee, it was not appellant's note. This note never was a valid instrument against appellant, because it never was executed by being delivered as signed. Therefore, the doctrine of mutilation or spoliation by mistake or accident, or by a stranger, can not apply. There was nothing valid to mutilate or spoil.

A material alteration in a note shown upon its face by erasures and interlineations, made after it has been signed by a surety and before delivery, without his knowledge or consent, destroys the note as to him, and it can not be enforced against him. He has a right to stipulate in his contract the amount and terms of his obligation, and where there is such a material change in either, it destroys his proposition to obligate himself, and it never becomes a contract. *Draper v. Wood*, 112 Mass. 315 (17 Am. R. 92-97, note *et seq.*); *Woodworth v. Bank of America*, 19 Johns. 391 (10 Am. Dec. 239, 270, note).

The evidence does not support the finding of the court, and the finding is, therefore, contrary to law.

Martin, Trustee, *et al.* v. Davis *et al.*

The court below erred in overruling the motion for a new trial, and consequently erred in sustaining the demurrer to the complaint for review.

The judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things reversed, at appellees' costs, and that the cause be remanded with instructions to the court below to overrule the demurrer to the complaint for review, and for further proceedings in accordance with this opinion.

No. 8032.

MARTIN, TRUSTEE, ET AL. v. DAVIS ET AL.

WILL.—*Construction.*—*Trust and Trustee.*—*Assignment of Income.*—A will bequeathed a sum of money, "to be held in trust under the direction and supervision of the court having probate jurisdiction," for the use of A. and B. during their lives, in equal amounts, "the interest to be paid to them semi-annually" by the trustee, and in the event of their death the principal was to go to their heirs.

Held, that either beneficiary could make a valid assignment of the income bequeathed to him, before the time fixed for its payment, the will imposing no restriction in reference thereto.

PARTIES.—*Plaintiffs.*—*Practice.*—Parties can not join as plaintiffs whose interests are in conflict with each other. It is necessary that they should have a common interest in the relief, and that each should be interested in the relief sought by the other.

SAME.—*Demurrer.*—*Misjoinder of Parties.*—A misjoinder of plaintiffs is reached by a demurrer to the complaint for want of sufficient facts.

From the Henry Circuit Court.

J. Brown, M. E. Forkner, J. R. Parmelee, L. L. Norton, D. Turpie, H. D. Pierce and A. Holladay, for appellants.
J. H. Mellett and E. H. Bundy, for appellees.

82	38
136	659
82	38
138	92
82	38
140	459
82	38
150	305
150	314

Martin, Trustee, *et al.* v. Davis *et al.*

BLACK, C.—Among the provisions of the will of Eli Davis, deceased, was the following :

“First. I will and direct that forty thousand dollars be set apart and held by my administrator, or such trustee or trustees as may be appointed by the court having probate jurisdiction, to be held in trust under the direction and supervision of said court, for the use of my sons Harvey Davis and Clinton Davis, in equal amounts, during their natural lives, the interest thereon to be paid to them semi-annually, by said trustee or trustees, and after their deaths or the death of either one, the principal to go to their heirs, in equal amounts. In the event, however, that either one of my said sons should become unable to labor in support of themselves, and should be without other means of support, then so much of the principal of the above sum as may be necessary for their support, or the support of either one, to be paid to them by said trustee or trustees, under the direction of said court, it being my will and intention that my said sons and their heirs shall have an equal amount of the above sum in the manner above set forth. But it is my express will and direction that neither of my said sons shall have any portion of the principal of the above sum except in case of absolute necessity for their support, as above stated.”

Simon Martin, one of the appellants, having been appointed trustee, and having taken upon himself the duties of the trust, holds the sum of \$20,000 for the use of Harvey Davis, under the above testamentary provision.

The question, whether a portion of the income of the fund so held could be assigned in anticipation by said Harvey, is raised by demurrer to the answer of the trustee, and by demurrers to the cross complaints of the other appellants, by which answer and cross complaints various assignments of said income by said Harvey were alleged. The will directs that the income of the fund be paid semi-annually by the trustee to the *cestui que trust* alone. No discretion is given to the trustee. The “direction and supervision” of the court are

Martin, Trustee, *et al.* v. Davis *et al.*

prescribed by the testator for the purpose of securing the use to the beneficiary, and not extended to depriving him thereof, or regulating his disposition of the income. The control of the court over the income of the fund invoked by these words is such as the court which appointed the trustee would have without such words in the will.

No particular use of the income is enjoined. No condition is attached to the gift. There is no limitation over to another person during the life of Harvey. There is no prohibition of alienation to a particular person or until a certain time. No restraint whatever is placed upon the beneficiary concerning the use of the income.

We need not decide in this cause whether the owner of personal property, in a testamentary disposition thereof, may or may not give in trust its income, free from the debts of the beneficiary, or restrain him from the alienation thereof. This will gave the beneficiary an unrestricted interest in the income of the fund during his life, which, where there is no statutory prohibition, as in this case, he may alienate as a whole or in part. *Perry Trusts*, sec. 386; *Story Eq. Jur.*, secs. 974, 1044, 1047; *Wood v. Wallace*, 24 Ind. 226; *Farmers' and Mechanics' Savings Bank v. Brewer*, 27 Conn. 600.

The New York decisions, which have been urged upon us as sustaining a contrary conclusion, proceed upon statutory construction. *Graff v. Bonnett*, 31 N. Y. 9; *Campbell v. Foster*, 35 N. Y. 361.

This interpretation of the will requires us to hold that the court erred in sustaining the demurrer of the appellees to the second paragraph of the answer of the appellant Simon Martin, and in sustaining the several demurrers to the cross complaints of the other appellants.

It is assigned as error by each of the appellants, that the complaint does not state facts sufficient to constitute a cause of action, and by some of the appellants that the court erred in overruling their demurrers, specifying the same ground of

Martin, Trustee, et al. v. Davis et al.

objection to the complaint. The plaintiffs were the beneficiary and his wife. It is alleged in the complaint that the court in which this suit was brought, having assumed supervision of the trust, had made an order, upon the motion of the appellees, that the trustee should accept no orders from the *cestui que trust*, but should pay out of the income a certain monthly allowance to his wife, and should pay the remainder of the income to the *cestui que trust* in person. It is not alleged that any of the appellants were parties, or had any notice of this motion. It is alleged that no money had been paid by the trustee in pursuance of this order, and that a certain amount of income had accumulated, and remained in his hands. The complaint asked that the trustee be required to pay a certain portion of this accumulation to the wife, and the remainder to the *cestui que trust*.

The trustee was made a defendant, with others, as to whom it was alleged that they claimed an interest in the accrued and accruing income, but, in fact, had no interest.

To entitle two or more persons to join as plaintiffs, it is not sufficient that they each have a cause of action, arising out of the same transaction or matter, if the relief sought by each be distinct and unconnected. The plaintiffs must have a common interest in the subject of the action, and in the relief. Each must be interested in the relief sought by the other. *Tate v. Ohio, etc., R. R. Co.*, 10 Ind. 174; *Goodnight v. Goar*, 30 Ind. 418; *Lipperd v. Edwards*, 39 Ind. 165; Bliss Code Pl., section 76; Moak's Van Santvoord's Pl. 68.

The interest of each of the appellees was adverse to that of the other, and the complaint was therefore insufficient.

The judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed, with costs, and the cause remanded.

Dunn *et al.* v. Dunn.

No. 9310.

DUNN ET AL. v. DUNN.

82	42
134	121
82	43
145	206

FRAUDULENT CONVEYANCE.—*Execution.*—*Parol Trust.*—*Agreement.*—Complaint to restrain the levy of an execution against another, upon lands of the plaintiff. Answer, that in 1868 the lands were conveyed by the execution defendant to the plaintiff, without consideration, upon a parol agreement that the latter would hold in trust for the former; and that afterwards in 1872, when the former became indebted to the execution plaintiff, he made a false and corrupt pretence of a purchase of the lands by the plaintiff from the execution defendant, in fraud of creditors, money being paid therefor, which was secretly returned, at which time the execution defendant had, and still has, nothing subject to execution. *Held*, that the answer was insufficient on demurrer.

Held, also, that said trust, if a trust at all, was an express one, and could not be created by parol.

From the Miami Circuit Court.

R. P. Effinger, H. J. Shirk and J. Mitchell, for appellants.
J. L. Farrar, J. Farrar and S. D. Carpenter, for appellee.

ELLIOTT, J.—Appellee alleges in his complaint that he is the owner of the real estate therein described; that the appellants have issued an execution upon a judgment rendered against David L. Dunn, and threatened to levy it upon and sell appellee's real estate to satisfy the judgment.

Appellants answered, admitting that on the 16th day of December, 1872, a judgment was obtained against David L. Dunn, and that they intend to seize and sell the real estate to satisfy the same, and averring that the judgment was rendered on a promissory note executed by the judgment debtor on the 4th day of February, 1868; that on the 6th day of April, of that year, the title to the real estate was in David L. Dunn; that, in order to obtain a loan from the school fund, he conveyed the land to appellee without consideration; that it was then verbally agreed by the grantee that he should hold the land for the grantor; that after the conveyance the appellee executed a mortgage to the school fund, obtained the desired loan, and delivered the proceeds to David L. Dunn, who re-

Dunn *et al.* v. Dunn.

ceived and appropriated them to his own use; that the land was held by the appellee under the deed and verbal agreement stated until 1872; that in that year the appellee and David L. entered into a corrupt agreement for the purpose of defrauding the creditors of the latter, who was then largely in debt and insolvent; that, pursuant to such agreement, the appellee pretended to pay three hundred dollars for the land; that he did pay over that sum, but received it back two days afterwards; that the judgment debtor, "David L. Dunn, at that time, and ever since, has had no property, real or personal, subject to execution, out of which said judgment, or any part thereof, could be made."

It will be observed that it is not alleged that David L. Dunn, the judgment debtor, had no property subject to execution, in 1868, when the conveyance was made. The allegation is that he had no property subject to execution in 1872, when the alleged corrupt agreement is charged to have been made. It is settled that the validity of a transaction is to be determined from the circumstances of the parties at the time it occurred. If the grantor is solvent at the time the grant is made, his subsequent insolvency will not render it invalid. *Rose v. Colter*, 76 Ind. 590; *Evans v. Hamilton*, 56 Ind. 34; *Sherman v. Hogland*, 54 Ind. 578; *Pence v. Croan*, 51 Ind. 336. The case in hand must, therefore, be determined from the facts existing at the time the appellee received the conveyance, and as there is no allegation that the grantor had then no other property subject to execution, the conveyance can not be overthrown upon the sole ground that it was a voluntary one. It is a familiar rule that want of consideration alone will not make a conveyance fraudulent as to creditors. *Parton v. Yates*, 41 Ind. 456.

A voluntary conveyance is valid as against the grantor and his heirs. *Sharpe v. Davis*, 76 Ind. 17; *Laney v. Laney*, 2 Ind. 196; *Findley v. Cooley*, 1 Blackf. 261. The conveyance from David L. Dunn to the appellee must, as between them, be adjudged valid unless the verbal agreement created a

trust which the latter could enforce. If a trust at all, it was an express one, and express trusts can not be created by parol. R. S. 1881, section 2969. *Minot v. Mitchell*, 30 Ind. 228; *Pearson v. East*, 36 Ind. 27; *Owens v. Lewis*, 46 Ind. 488; *Irwin v. Ivers*, 7 Ind. 308; 1 Perry Trusts, section 79. No enforceable trust was created by the verbal agreement, and the judgment debtor, David L. Dunn, could neither have enforced the trust nor set aside the conveyance.

Such rights as the creditors of David L. possess, they acquire through him. He had no right to annul the conveyance, and they have acquired none. A creditor can not overturn a conveyance, valid as against his debtor, unless it be shown to be fraudulent. We have already seen that the conveyance to the appellee is not shown to have been fraudulent as to creditors, and it therefore follows that it can not be overthrown at their suit.

The answer does not charge that at the time the deed was executed to the appellee there was any intention to defraud creditors; nor does it show any reason why a purely voluntary conveyance then made would not have been valid. There is no allegation that there was any intention to injure creditors, and if it were conceded that the transfer of the title was a wrongful evasion of law, it conferred upon creditors no right of action. Creditors can not impeach a conveyance not made for the purpose of defrauding them, and which works them no injury although it may be made for some other corrupt purpose.

If an enforceable agreement had been made between the appellee and the debtor, the creditors might, doubtless, have reached the grantor's interest, but there was no such agreement. The appellee holds by a deed, and no mere parol trust can prevail against it. The agreement relied on being entirely destitute of force, the deed stands alone, and, of course, invests the grantee with title. The deed can only be rendered ineffective by some valid agreement, and none such

Walker *et al.*, Administrators, *v.* Beggs *et al.*

having been shown, it remains in full force, and under it the appellee holds a title which the creditors can not destroy.

The court did not err in holding the answer bad.

Judgment affirmed.

No. 8722.

WALKER ET AL., ADMINISTRATORS, *v.* BEGGS ET AL.

SUPREME COURT.—*Practice.—Weight of Evidence.*—The Supreme Court will not disturb the verdict of a jury, or the finding of a trial court, upon the mere weight of the evidence.

SAME.—*Causes for New Trial.—Admission of Evidence.*—Rulings of the trial court in the admission of evidence, complained of as erroneous, must be assigned as causes for a new trial in the motion therefor; if not so assigned, the Supreme Court will not consider them, nor decide any question thereby presented.

From the Franklin Circuit Court.

F. J. Hall, T. J. Newkirk, L. Sexton and C. Cambern, for appellants. .

HOWK, J.—The Brookville National Bank, as plaintiff, commenced this action against Jane G. Johnston, Rebecca M. Burris, Francis W. Burris, and John Walker and Elizabeth Walker, administrators of the estate of John Walker, Sr., deceased, and John Beggs, as defendants. The suit was brought upon a promissory note, and its endorsements, in substance, as follows:

“\$5,000. BROOKVILLE, IND., February 2d, 1877.

“Ninety days after date we, or either of us, promise to pay to the order of John Walker, at the Brookville National Bank, of Brookville, Indiana, five thousand dollars, value received, without any relief whatever from valuation or appraisement laws, with ten per cent. interest after maturity, and five per cent. attorney’s fees. The drawers and endorsers severally

Walker et al., Administrators, v. Beggs et al.

waive presentment for payment, protest, notice of protest and non-payment of this note.

(Signed)

"REBECCA M. BURRIS.

"JANE G. JOHNSTON."

Endorsed: "JOHN WALKER.

"JOHN BEGGS."

As between the plaintiff and the defendants, in this action, there was and is no controversy; but the only matters in issue in the circuit court were such as arose upon the respective pleadings of the administrators of John Walker, deceased, and of the appellee John Beggs. It was shown by the record that John Walker, Sr., deceased, was, in his lifetime, the payee and first endorser of the note in suit, and that the appellee Beggs was the second endorser of such note. The appellants, the administrators of John Walker, Sr., deceased, filed what is called their separate answer and cross complaint in this case, wherein they admitted that their decedent endorsed the note in suit, and afterwards, on April 4th, 1877, departed this life, and that on April 20th, 1877, they were appointed the administrators of said decedent's estate; but they alleged that the note in suit was a renewal of an old note given for a debt created on the 27th day of July, 1875; that said debt was kept in existence by giving a new note at intervals of about ninety days from the last-named date, until the note sued upon was executed; that said first note was signed by Rebecca M. Burris and Jane G. Johnston, payable to John Walker and John Beggs, who endorsed said note to the Brookville National Bank, as co-sureties of the makers thereof to the plaintiff, the bank; that the said parties kept said paper renewed in the same way each time, but they averred that the consideration of said note moved wholly to, and was received by, the defendants Rebecca M. Burris and Jane G. Johnston; that no part of the consideration of said note moved to, nor was any part thereof received by, the said John Walker, Sr.; and that said John Walker, Sr., and the appellee John Beggs were co-sureties and co-securities only

Walker et al., Administrators, v. Beggs et al.

for their co-defendants Rebecca M. Burris and Jane G. Johnston. Wherefore the appellants demanded that the said Rebecca M. Burris and Jane G. Johnston be first made liable for the payment of said debt; that the estate of said John Walker, Sr., and said John Beggs be rendered equally liable as sureties on said debt, and that judgment be entered accordingly; that the property of each party should be subjected to the payment of said debt, in accordance with the aforesaid facts, and for all other proper relief.

The appellee Beggs answered the appellants' cross complaint by a general denial, and also filed his cross complaint against the administrators of John Walker, Sr., deceased, wherein he admitted that the note in suit by the bank was executed by the defendants Burris and Johnston, to the order of John Walker, Sr., since deceased, who endorsed the same to the appellee Beggs, and he, as an accommodation endorser merely, endorsed the note to the plaintiff, the bank; that at the time of the execution of the note, and before it was endorsed by the appellee to the plaintiff, the said John Walker (since deceased), the payee and first endorser of the note, had and held a mortgage to indemnify him, as such payee and first endorser of the note, which was a renewal of a former note that had been renewed from time to time, until all the former notes were merged in the note in suit; that all the former notes were executed by the parties to the note sued on, and their respective liability on all the notes had been the same as on the note then in suit; that such mortgage of indemnity was executed by Jane G. Johnston, one of the makers of the note, to the payee and first endorser thereof, John Walker, since deceased; that the mortgage was so executed on March 20th, 1876, and recorded on April 6th, 1876, in the recorder's office of Franklin county, and still remained in full force; and that the mortgaged property was of the value of eight thousand dollars; that after the execution of the mortgage, and after the execution and endorsement of the note in suit, on April 4th, 1877, John Walker, the payee and first

Walker et al., Administrators, v. Beggs et al.

endorser of the note, died intestate, and the appellants were the administrators of the decedent's estate ; and that none of the proceeds of the note in suit, or of any former note constituting the consideration of the note sued upon, enured to the benefit of the appellee Beggs ; that, as the last endorser of the note, the appellee is last liable thereon, and the makers thereof and the estate of John Walker, the payee and first endorser of the note, were first liable thereon ; wherefore, etc.

The appellants answered the cross complaint of the appellee Beggs, by a general denial. The issues joined upon the cross complaints were tried by the court, and a finding was made that Jane G. Johnston and Rebecca M. Burris, the makers of the note in suit, were first liable thereon ; that the estate of John Walker, the payee and first endorser of the note, then deceased, was next liable thereon ; and that the appellee Beggs, as the last endorser of the note, was last liable thereon. Over the appellants' motion for a new trial, and their exception saved, the court rendered judgment in favor of the bank for the amount found due on the note in suit, and, in accordance with its finding upon the said cross complaints, declared the order in which the several judgment defendants should be liable for its payment.

The only error assigned by the appellants is the decision of the circuit court, in overruling their motion for a new trial. In this motion, the only causes assigned for such new trial were, that the finding of the court, upon the issues joined on the several cross complaints, was not sustained by sufficient evidence, and that it was contrary to law.

It will be seen, therefore, that the only question presented for decision, by the record of this cause and the error assigned thereon, is this: Is the finding of the trial court, upon the matters in issue between the appellants and the appellee John Beggs, sustained by sufficient legal evidence? This question has been elaborately discussed by the appellants' counsel ; while the appellee Beggs has failed to furnish this court with any brief or argument, in support of the de-

Worland *et al.* v. The State.

cision of the circuit court. There is evidence in the record, which fairly tends to sustain the finding of the court upon the questions in issue. Indeed, the finding of the court, in relation to the order in which the parties to the note were liable thereon, is sustained *prima facie* by the note itself and its endorsements. This court will not weigh evidence, nor attempt to determine its preponderance. But the rule may be regarded as settled that this court will not disturb the verdict of a jury, or the finding of the trial court, when, as in this case, the evidence fairly tends to sustain the same on every material point. *Rudolph v. Lane*, 57 Ind. 115; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Stockwell v. Thomas*, 76 Ind. 506.

The appellants' counsel complain, in argument, of the rulings of the trial court in the admission of evidence alleged to be incompetent. These rulings, however, were not assigned as causes for a new trial, in the appellants' motion therefor. It is well settled that unless such rulings are assigned as causes for a new trial, in the motion therefor, this court will not consider them, nor decide any question thereby presented. *Leary v. Ebert*, 72 Ind. 418; *Stockwell v. Thomas, supra*.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 9431.

WORLAND ET AL. v. THE STATE.

CONTEMPTS.—*Courts.*—*Appeal.*—*Statute Construed.*—Under the act of March 31st, 1879, in relation to contempts of courts, R. S. 1881, sections 1005 to 1013, there may be an appeal to the Supreme Court in cases of indirect contempt, though the punishment adjudged be only a fine in a sum less than twenty-five dollars.

VOL. 82.—4

82	49
150	96
82	49
170	639

Worland *et al.* v. The State.

SAME.—Affidavit.—Information.—Practice.—In a prosecution for an indirect contempt under such act, an information by the prosecuting attorney is not required. An affidavit or duly verified information of an officer of the court or other responsible person is sufficient, but the filing, in addition, of an information by the prosecutor will not vitiate the proceedings.

SAME.—Rule.—The rule against the defendant in proceedings for contempt, should set forth the facts shown in the affidavit or information, but will not be bad for reciting the facts "as alleged in the affidavit," which is the foundation upon which the rule must stand.

SAME.—Waiver of Rule.—The defendant in a prosecution for contempt may waive the issuing of a rule against him, and make his answer to the information or affidavit.

SAME.—Amendment of Rule.—If in proceedings for contempt the rule be quashed, the information being good, an amended rule may be issued.

SAME.—Newspaper Publication.—An information for contempt on account of a newspaper article, which charges that the publication was "false and grossly inaccurate," is insufficient, if it does not specify in what respects the article is false.

From the Shelby Circuit Court.

B. F. Love, H. C. Morrison, T. B. Adams and L. T. Michener, for appellants.

D. P. Baldwin, Attorney General, *W. W. Thornton and L. J. Hackney*, for the State.

WOODS, J.—Prosecution under the act of March 31st, 1879, Acts 1879, p. 112, against the appellants and others for an indirect contempt of court. The appellants were adjudged guilty and fined, Worland in the sum of fifty dollars, and Thompson twenty-five dollars. Error is assigned upon the overruling of the motion of the appellants to quash the affidavit and information, and to set aside the rule against them to show cause, and upon other rulings of the court, which need not be stated.

The affidavit on which the prosecuting attorney filed an information and obtained the rule against the defendants was, in substance, as follows:

"That the defendants did unlawfully and falsely make, utter and publish as true a certain false and grossly inaccurate report of a case, trial and proceeding, and certain parts

Worland *et al.* v. The State.

of a case, trial and proceeding, pending in and of said court, then and there and theretofore during the said, the present, term of said court, to wit: A cause wherein John Landwerlen was and is plaintiff, and Francis J. Rudolf was and is defendant, which said cause, trial and proceeding had been commenced, and was in said Shelby Circuit Court then and is still pending incomplete and not fully determined and ended, and while said court had and has jurisdiction thereof; which said false and grossly inaccurate report so unlawfully and falsely made, uttered and published, was made, reported, printed and published in a daily newspaper of general circulation, printed and published in the city of Shelbyville, in said county of Shelby, in the State of Indiana, called and known as the *Daily Evening Republican*, and is in the words and figures following:" (Here follows a copy of the article alleged to have been published.) "Which said false and grossly inaccurate report was then and there by said defendants made, uttered and published with intent to destroy the confidence in, and to bring said court into contempt; and by reason of the premises the affiant avers that said defendants are in contempt of this court."

The rule issued against the defendants required them to appear and to "answer to said court the following facts, alleged in said court to constitute a contempt of said court, and to show cause why you (defendants) should not be attached and punished for such contempt, which is charged to exist, by reason of the publication by you, with others, of an alleged false and grossly inaccurate report of a case, trial and proceeding, and certain parts of a case, trial and proceeding, then, to wit, on the 19th day of January, 1881, and now pending in the said Shelby Circuit Court, undetermined and not fully completed and ended, and heretofore commenced in said court; which report was on said day published in a newspaper printed and published in Shelbyville, in said county and State, known and called the *Daily Evening Republican*, and is in the words and figures following:" (here is set out the alleged publica-

Worland *et al.* v. The State.

tion); "which said alleged false and grossly inaccurate report was of and concerning the case of John Landwerlen against Francis J. Rudolf, pending in said Shelby Circuit Court as aforesaid."

The publication referred to was as follows:

"INDIGNANT CATHOLICS—THEY MEET AND PASS A SERIES OF STRONG RESOLUTIONS IN DEFENCE OF THEIR RELIGION, DECLARE THEIR PURPOSE AND DO NOT HESITATE TO ATTACH THEIR NAMES TO THE IMPORTANT DOCUMENT FOR PUBLICATION.

"We, the undersigned members of St. Joseph's Church, Shelbyville, Ind., held a meeting on Monday evening, January 10th inst. The meeting having been called to order by Mr. Simon Worland, Mr. Peter Hirschauer was elected chairman, and Mr. Simon Worland, secretary.

"The chairman then announced the object of the meeting. He stated that they had assembled to discuss the conduct of the court of Shelby county, Indiana, and the assertions made by Judge Glessner and E. K. Adams during the trial of *Landwerlen v. F. J. Rudolph*.

"We first of all unanimously express our regret that the court of Shelby county, Indiana, had lost sight of its high calling and of the meaning of the constitution of the United States in the aforesaid trial. The constitution of these United States guarantees equal rights to all and full freedom of conscience to all—to Jews and Gentiles, to Christians and heathens alike. In fact, the constitution knows no religion, nor do the courts of these United States know any religion. Said trial was from the beginning to the end a continued insult on the witnesses individually, and on the Catholics in general. Catholicity seemed to be the main part of the trial. The witnesses were obliged to make their profession of faith in the court-room on this occasion. It may be truly called a theatrical mockery of the Catholics of Shelby county. The court allowed the attorneys, Judge Glessner and E. K. Adams, to

Worland et al. v. The State.

use the most vilifying and abusive language against the defendant, and the Catholics in general. The court has allowed such and we hold it responsible. The court also excused an important witness in the case—Dr. Kennedy—with an excuse that does not correspond with the statement of the doctor, made this evening to a committee appointed by this meeting. For this also we hold it responsible. The court also refused to hear the testimony of Dr. Parrish, for which we also hold it responsible.

“We unanimously denounce as false and untrue the assertions made by Judge Glessner and E. K. Adams, viz.: ‘That the defendant in this case had called a meeting and instructed the persons of the meeting how and what to swear in his behalf, whether true or false.’

“We challenge said lawyers to prove the above assertion, and, unless they do so, they will stand branded as vilifiers and as public slanderers.

“We denounce as false the assertion of Judge Glessner, viz.: ‘That a Catholic priest can invite any member of his church to swear false, and then absolve such from the crime of perjury, and that everything is all right.’

“We challenge Judge Glessner to prove the above assertion, and that such is the doctrine of the Catholic church. If he fails to do this, his Honor will stand branded as a falsifier and a public slanderer.

“Having plainly stated the reason of our dissatisfaction with the treatment we have received at their hands, and with the consent of the court, to which we had heretofore given our entire support, we unanimously agree to remember such treatment in the future, when our vote will be as valuable as any others. And we further agree that we will give our entire support to bring about a change in the court of Shelby county, Indiana. Witness our hands.

Signed: PETER HIRSCHAUER, chairman.

“SIMON B. WORLAND, secretary.

“And the other defendants, except Thompson.”

Worland et al. v. The State.

We are met at this point with a motion that the appeal of Thompson be dismissed. It is claimed that there is no right of appeal from a judgment assessing a fine of less than fifty dollars for a contempt of court.

By the last clause of section 9 of the act above mentioned, it is provided, in reference to indirect contempts, that "the defendant, having appeared to such rule, may except, file a bill of exceptions, and appeal to the general term and to the Supreme Court, in the same manner as in cases of direct contempt."

The provision concerning the right of appeal from a conviction for direct contempt is contained in the 7th section of the act, and is as follows:

"And if found guilty, the defendant shall have the right to except to the opinion and judgment of the court. And in all cases where the defendant may be adjudged to pay a fine of fifty dollars or more, or to be imprisoned for such contempt, he shall have the right, either before or after the payment of such fine or undergoing such imprisonment, to move the court to reconsider its opinion and judgment of the case, upon the facts before it, or upon the affidavits of any or all persons who were actually present and heard or saw the conduct alleged to have constituted such contempt; * * * and, if the court shall thereupon overrule such motion, the defendant may except and file a bill of exceptions, as in other criminal actions; and in all cases an appeal shall lie thereupon to the Supreme Court."

The appellant contends that the last clause gives the right of appeal in all cases of direct contempt, though the punishment be only a fine of less than fifty dollars, and that, in cases of indirect contempt, the only restriction on the right of appeal, which, as is claimed, is allowed in all criminal cases, is, that the party may "appeal in the same manner as in cases of direct contempt," and that this restriction applies only to the mode of procedure and not to the right itself.

What the construction of the statute in this particular

ought to be, in respect to direct contempts, we need not and do not now decide; but after a careful consideration of the subject, in respect to indirect contempts, we have concluded, with some hesitancy, to hold that the right of appeal is not restricted by the amount or nature of the penalty.

This brings us to a consideration of the merits of the appeal.

The fifth section of the act regulating prosecutions for contempt provides:

“Every person who shall falsely make, utter, or publish any false or grossly inaccurate report of any case, trial, or proceeding, or part of any case, trial, or proceeding thereof, shall be deemed guilty of an indirect contempt of the court in which such case, trial, or proceeding may have been instituted, held, or determined,” etc.

Section 8 prescribes and defines the manner in which a proceeding for indirect contempt shall be instituted and conducted, as follows: “In all cases of indirect contempt, the person charged therewith shall be entitled, before answering thereto or being punished therefor, to have served upon him a rule of the court against which the alleged contempt may be committed; which said rule shall clearly and distinctly set forth the facts which are alleged to constitute such contempt, and shall specify the time and place of such facts with such reasonable certainty as to inform the defendant of the nature and circumstances of the charge against him. * * * * No such rule, as hereinbefore provided for, shall ever issue until the facts alleged therein to constitute such contempt shall have been brought to the knowledge of the court by an information duly verified by the oath or affirmation of some officers of the court or other responsible person.

“Sec. 9. If the defendant shall fail to appear in said court, at the time and place specified in the rule provided for in the last preceding section, to answer the same, or if, after having appeared thereto, the defendant shall fail or refuse to answer touching such alleged contempt, the court may pro-

Worland *et al.* v. The State.

ceed at once, and without any further delay, to attach and punish him or her for such contempt; but if the defendant shall answer to the facts set forth in such rule, by showing that, even if they are all true, they do not constitute a contempt of the court, or by denying or explaining or confessing and avoiding them, so as to show that no contempt was intended, then, and in every such case, the court shall acquit and discharge the defendant. But if the defendant shall not, in his answer to such rule, sufficiently deny, explain, or avoid the facts therein set forth, so as to show that no contempt has been committed, the court may proceed to attach and punish him for such contempt," etc.

It is clear that no information by the prosecuting attorney is required in a prosecution under this statute. An affidavit or "information duly verified by the oath or affirmation of some officers of the court or other responsible person," is required, and nothing more, and upon this information the rule of court issues, wherein shall be set forth the facts stated in the information, which are alleged to constitute the contempt. The fact that an information, in addition to the affidavit, was filed by the prosecuting attorney, does not affect the validity of the proceeding. It was superfluous, but harmless. The specific objections made to the affidavit, and to the rule of court issued against the appellant, are the following:

"*First.* That there is a repugnancy in charging, though in the language of the statute, that the publication was 'false and grossly inaccurate;' that a false thing is false *in toto*, and a grossly inaccurate thing is something less than false, and different from it, repugnant to it.

"*Second.* That it is not shown wherein the report was inaccurate and false.

"*Third.* That the rule against the appellant was defective, for the further reason that it does not 'clearly and distinctly set forth the facts which are alleged to constitute such contempt,' but professes only to set forth alleged facts; that the rule is the pleading, which the defendant in such a case must

answer, and it must contain a direct and explicit charge of the facts, and not of alleged facts, which are claimed to constitute the contempt."

It is true that the defendant is required to answer the rule, or "the facts set forth in such rule," and, consequently, the necessary facts must be set forth therein; yet we think it enough, if they are recited therein as alleged or charged in the information or affidavit, which is the real foundation of the proceeding, and without which the rule itself can not stand. See *Gill v. State, ex rel.*, 72 Ind. 266. The issuing and service of the rule is necessary to the jurisdiction of the court over the defendant charged with indirect contempt, unless he consent to appear voluntarily, and, if the rule be defective, it should, on motion, be quashed and the defendant discharged therefrom, though the information be good; and yet, if the defendant should appear and voluntarily consent to answer to the information, without the issuing and service of a rule, we perceive no insuperable objection to its being done. So, too, if the rule be quashed, on account of defects in itself, unconnected with the affidavit, it may doubtless be amended and re-issued and served. In any view, the proceeding must be deemed to rest on the verified information, and if that is sufficient, and if the rule contains a statement of the facts constituting the charge as alleged in the information, it must be deemed good. There is no injustice to the accused in so holding, because, if the information is defective, he can move to quash or set aside the rule, on account of the insufficiency of the affidavit.

As to the alleged repugnancy, the terms "false" and "grossly inaccurate" are not so inconsistent that they may not stand together in a charge otherwise sufficient. It might be enough to charge in such a case that the defendant had uttered a false publication, and it would perhaps be held good as meaning that the statement published was totally false. To charge simply that the publication was grossly inaccurate, would not

The State, *ex rel.* Braden, Assignee, *v.* Krug *et al.*

be enough, but it would be necessary to specify in what respect the same was claimed to be inaccurate.

In this case the charge is that the publication was "false and grossly inaccurate," and the question is whether that is sufficiently definite. We have come to the conclusion that it is not. The use of the words "*grossly inaccurate*" implies that the publication was not wholly false, and that the word *false*, as used, meant only false in some respects or degree. This being so, it is a plain and just requirement that the particulars in which it was designed to show that the publication was false or inaccurate, should have been stated. It may be that some of the statements contained in the publication are not such as to sustain a charge of contempt, if conceded to be false or inaccurate. The charge surely ought to be so definite and distinct that its meaning and sufficiency could be determined on motion, and that the accused could know certainly what he was required to answer.

The judgment against each appellant is reversed, and the case remanded with instruction to sustain the motions to quash both the information and the rule to show cause.

88	59
138	150
82	58
149	369

No. 8435.

THE STATE, EX REL. BRADEN, ASSIGNEE, *v.* KRUG ET AL.

SHERIFF'S BOND.—*Action on.*—*Complaint.*—*Voluntary Assignment.*—A complaint, by the assignee of an insolvent debtor, on the bond of a sheriff, for the wrongful taking of property of the debtor conveyed to him, which gives no description of the property or copy of the deed of assignment or its date, and does not show when or where it was recorded, is insufficient.

SAME.—*Title of Assignee.*—In such action the complaint need not state the particulars of the assignee's title, but if it undertakes to do so, and thereby shows want of title, it is insufficient on demurrer.

VOLUNTARY ASSIGNMENT.—*Lien of Execution.*—A voluntary assignment for the benefit of creditors, made by an execution defendant, does not divest the lien of the execution.

The State, *ex rel.* Braden, Assignee, *v.* Krug *et al.*

PRACTICE.—Bill of Exceptions.—Motion to Strike Out.—The ruling of the court in striking out a pleading must be shown by a bill of exceptions, to present any question thereon in the Supreme Court.

SAME.—A pleading having been struck out of the record can be brought back only by a bill of exceptions, or by order of court.

SAME.—Demurrer to Answer.—A demurrer to an answer tests the sufficiency of the complaint.

SAME.—Judgment on Defective Complaint.—Where the complaint fails to show a cause of action, and a judgment is rendered against the plaintiff, he can not complain thereof on account of error in ruling upon his demurrer to an answer.

From the Montgomery Circuit Court.

E. C. Snyder, for appellant.

G. W. Paul, J. E. Humphries, W. C. Wilson and J. H. Adams, for appellees.

BICKNELL, C. C.—This was an action against a sheriff and his sureties, on the sheriff's official bond. The breach alleged was, that, on March 4th, 1879, the sheriff held an execution, issued from the Montgomery Circuit Court, in favor of James H. Dunham and others against William B. Patch, and on April 24th, 1879, levied the same, by color of his office, upon certain property in said county, of the value of \$5,000, and took the property into his possession, the same being then and there "the property of the said Alba H. Braden, as assignee for the benefit of the creditors of William B. Patch," having been duly conveyed to said Braden "by an indenture of assignment made by said William B. Patch, by virtue of the laws of the State of Indiana, which indenture was, on the—— day of ——, 1879, duly recorded in the Recorder's office of Montgomery county, Ind., as deeds are recorded." That, by such wrongful taking, said Braden was prevented from selling said property, to his damage \$1,000, and was otherwise damaged in the sum of \$5,000.

A demurrer to the complaint for insufficiency of facts was overruled.

The defendants answered in seven paragraphs, of which the fifth was the general denial. Demurrers to the first, fourth

The State, *ex rel.* Braden, Assignee, *v.* Krug *et al.*

and seventh of these defences were overruled; demurrers to the second, third and sixth defences were sustained.

The plaintiff replied to the first, fourth and seventh defences, in two paragraphs, to wit: *First.* In denial. *Second.* A special reply, which was struck out.

The issues were tried by the court, who found for the defendants. The plaintiff's motion for a new trial was overruled, and judgment was rendered upon the finding. The plaintiff appealed, but has assigned no error upon the overruling of the motion for a new trial.

The only errors assigned are, overruling the demurrers to the first, fourth and seventh defences, and striking out the second paragraph of the reply.

No question is presented in reference to such striking out, because the ruling of the court thereupon is not shown by any bill of exceptions. *Thomas v. Hamilton*, 71 Ind. 277. The reply, having been struck out of the record, can be brought back only by bill of exceptions, or by order of the court. The demurrers to the defences search the record and test the sufficiency of the complaint. *Ætna Ins. Co., etc., v. Baker*, 71 Ind. 102; *Gould v. Steyer*, 75 Ind. 50.

In *Kellogg v. Tout*, 65 Ind. 146, it was held that, where the complaint fails to show a cause of action, and there is a judgment against the plaintiffs, they can not complain of the judgment, although there may be error in the rulings upon their demurrers to the answers. Therefore, if the complaint be insufficient, the judgment below ought to be affirmed.

The statute of voluntary assignments for the benefit of creditors, 1 R. S. 1876, p. 142, sec. 2, provides that such assignments "shall be by indenture duly signed and acknowledged * and shall within ten days after the execution thereof, be filed with the recorder of the county in which the assignor resides, whose duty it shall be to record the same as deeds are recorded. The indenture of assignment shall contain a full description of all real estate thus assigned, and be accompanied by a schedule containing a particular enumeration and

The State, *ex rel.* Braden, Assignee, *v.* Krug *et al.*

description of all the personal property assigned. * * * No assignment under this act shall convey to the assignee any interest in the property so assigned until such assignment is recorded as provided for in this section."

Upon these statutory provisions, it has been held that no title to the property assigned passes to the assignee, until the assignment is recorded. *New v. Reissner*, 56 Ind. 118; *Forkner v. Shafer*, 56 Ind. 120; *Switzer v. Miller*, 58 Ind. 561. It has also been held that a complaint by a party claiming as such assignee, which does not allege that the assignment has been duly recorded, and does not contain a copy thereof, is insufficient on demurrer. *Foster v. Brown*, 65 Ind. 234; *Ross v. Boswell*, 60 Ind. 235. And such an assignment, made by an execution defendant, does not divest the lien of the execution. *Griffin v. Wallace*, 66 Ind. 410; *Marsh v. Vawter*, 71 Ind. 22. But in an action by such an assignee, to recover from a wrong-doer the property assigned or damages for taking it, the complaint need not state the particulars of the assignee's title. It may allege generally that the plaintiff was the owner of the property and entitled to the possession of it. *Krug v. McGilliard*, 76 Ind. 28. Yet if the complaint, in such case, undertaking to show title as assignee, shows affirmatively a want of title, it will be bad upon demurrer.

The complaint under consideration is insufficient for several reasons:

It gives no description of the property. It does not state whether the property was real or personal.

It sets out and relies upon a written instrument as the foundation of the claim, and no copy of the alleged writing is annexed to or filed with the complaint.

It does not give the date of the alleged writing, nor the time of its execution, and it does not show that the assignment was executed before the issuing of the execution.

It does not show when the assignment was recorded, nor that it was recorded before the levy of the execution, or before the issuing of the execution; the complaint alleges that the

Tasker v. Moss et al.

execution was in the sheriff's hands on the 9th of March, 1879, and was levied on the 24th of April, 1879, and that the assignment was recorded on the — day of —, 1879. It does not appear that the assignment was recorded before the execution was issued. The complaint does not state that the county in which the assignment was recorded was the county of the assignor's residence.

The complaint, under the authorities above cited, was clearly insufficient, and therefore the judgment below in favor of the appellee ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant's relator.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The appellant admits that the complaint was insufficient, but says he was defeated on the trial because of matter admitted in evidence under bad answers.

Demurrers to three of the defences were overruled, and errors were assigned on such rulings.

The appellant says: "The court should pass upon such alleged errors, and if found to exist, should reverse the case, at the appellant's costs."

But the complaint being clearly bad, it was not necessary to examine the answers, for, even if they were defective, they were good enough for a bad complaint.

The petition for a rehearing should be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

No. 8789.

TASKER v. MOSS ET AL.

FRAUDULENT CONVEYANCE.—*Action against Grantee.*—A creditor who has no lien upon the property of his debtor can not maintain an action against a person who has accepted a conveyance of the property, for the

Tasker v. Moss et al.

purpose of defrauding the creditor, and who has conveyed the property to another at the instance and for the benefit of the debtor, without retaining any portion of it, or receiving any benefit from it.

From the Steuben Circuit Court.

R. W. McBride, for appellant.

D. R. Best, ——— *Powers, J. A. Woodhull and W. G. Croxton*, for appellees.

BEST, C.—The appellees Samuel A. Moss and Warren Moss alleged substantially in their complaint, that Thomas Tasker, who was also made a party, on the 20th day of July, 1878, was the equitable owner of forty acres of land in Steuben county, Indiana, which he held by virtue of a certificate issued to him by the auditor of said county; that, at that time, he had no other property subject to execution, and since that time he has remained insolvent; that before that time he was indebted to the appellees upon a note on which they had recovered a judgment against him before a justice of the peace, for \$147.18; that on said day said Tasker, for the purpose of cheating and defrauding the appellees out of their claim, transferred said certificate, without consideration, to the appellant, who had full notice of Thomas Tasker's intention, and who accepted said assignment for the purpose of aiding him in consummating such fraud; that said Thomas had paid \$1,200 upon said land, had made improvements upon, was in possession of it and continued in possession of it until January 8th, 1879, when the appellant, at the instance of Thomas and for his benefit, transferred said certificate to one Eli Miller, who purchased said land for full value and without notice of appellees' claim, all of which was done by said Thomas and the appellant, to defraud the appellees out of their claim, and by reason thereof they have lost the same.

Thomas made default, and the appellant demurred to the complaint for the want of facts, but his demurrer was overruled, and he excepted. An issue was formed, a trial had, and, over a motion for a new trial, judgment was rendered against the appellant for \$174.52.

Tasker v. Moss et al.

The appellant assigns as error the order of the court in overruling the demurrer to the complaint, and in overruling the motion for a new trial.

Both assignments present the same question. The evidence is in the record, and it shows that Thomas, on the 8th of January, 1879, exchanged the land in question for eighty acres of land in Nebraska, which Miller then conveyed to him, and that appellant, at the same time, at the instance of Thomas, transferred the certificate to Miller, without receiving anything himself. All other averments are proved as made. Under these circumstances, is the appellant liable to the appellees? This action was not commenced until the 6th of March, 1879, and as the appellees had acquired no lien upon or interest in the land so transferred, we are of opinion that they can not maintain this action against the appellant.

At the time this action was commenced the appellant did not even hold the certificate, and, therefore, there was no ground upon which to charge him as a trustee. *Bump Fraudulent Conveyances*, p. 589.

The ground of the appellant's alleged liability was his collusion with the debtor in transferring property that might have been subjected to the payment of the appellee's debt. This, however, under the circumstances stated, created no liability.

Bump on Fraud. Convey., p. 515, thus states the rule: "If a fraudulent disposition has actually been made by the debtor of his property, a creditor can not, in the absence of special legislation, bring an action in assumpsit, or on the case, against those who combined and colluded with him. Assumpsit will not lie, for there is neither an express promise nor a privity from which the law will imply a promise to pay the debt of the creditor. An action on the case can not be supported because the damages are too contingent and remote. As a creditor has no special title in or to the property of the debtor, the only proof of loss or injury which he could make

Tasker v. Moss *et al.*

would be that the debtor had fraudulently conveyed it away without receiving any value for it with the intent to avoid the payment of his demand, and that he had no other means of obtaining payment. Upon such proof he would not be entitled to recover the amount of his debt, for that would still be subsisting, and might yet be collected. Nor would he be entitled to recover the value of the property conveyed, for to that he has no better claim than other creditors. The only loss or injury which could be shown would be that he has been deprived of the chance or possibility of obtaining payment from that property. The loss would not even be so great as this, for he might still have a chance of reaching the property or its proceeds in the hands of the fraudulent holder. The value of his chance to secure it and have it applied to the payment of his debt while in the hands of the debtor is all that he has lost and would be the only basis upon which a jury would be authorized to estimate his damages. There are no data, tables, or other means by which such a chance can be estimated. The loss or injury is too uncertain and remote for legal estimation. The action can only be maintained by proof of a direct, certain, and material injury. If the creditor, however, has a lien upon the property which has been defeated by the transfer, his damages are sufficiently direct to sustain the action." See also *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 145.

This rule of law is well supported by authority, and as the facts averred and proved bring the case clearly within the rule, it follows that the action can not be maintained.

For these reasons the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellees' costs, with instructions to sustain the demurrer to the complaint.

Booth v. Fitzer.

No. 8114.

BOOTH v. FITZER.

PROMISSORY NOTE.—*Failure of Consideration.*—*Demand.*—Where a note is given solely for copies of certain secret recipes and chemical formula, with instructions in their use, to be furnished by the payee, and the latter fails to furnish the copies or give the instructions, the maker being ready to receive them, a demand for them is unnecessary, and there is a failure of consideration of the note.

DEMAND.—A demand is not necessary where it is shown that it would be unavailing.

From the Cass Circuit Court.

D. C. Justice and *D. B. McConnell*, for appellant.

D. P. Baldwin and *D. D. Dykeman*, for appellee.

NIBLACK, J.—Suit by John Fitzer, against Jasper N. Booth, upon a promissory note for the sum of \$250, dated May 1st, 1876, and payable ten months thereafter, with ten per cent. interest from date.

The action was commenced before the city judge of Logansport, and afterwards appealed to the Cass Circuit Court, where there was a verdict and judgment for the plaintiff for the amount of the note, with interest.

The defence relied upon at the trial was a failure of the consideration for which the note was given, and the alleged disregard by the jury of the evidence introduced to sustain that defence raises the only question presented for our decision.

The defendant testified in his own behalf, and the material portions of his testimony were to the effect that the note in suit was given for one-fourth of a half interest in certain receipts, formulas and trade-marks used in the Musser Chemical Works at Logansport, for the manufacture of baking powder, and flavoring extracts and perfumes; that one O. S. Musser, the original owner of such receipts, formulas and trade-marks, came to Logansport from Lafayette with a man by the name of Hurley; that these two persons, together with the plain-

Booth v. Fitzer.

tiff and defendant, and one Morris, established the chemical works above named; that shortly afterwards Hurley sold out his interest to one Ijams; that Musser claimed to own the receipts, formulas and trade-marks as a secret within his own knowledge, and put their use into the chemical works as a part of the capital, valued at \$3,000, and the other parties in the business put in \$5,000; that Musser used the receipts and formulas in the business of the chemical works from the time of their establishment, in March 1876, he alone doing all the mixing and preparation of the chemicals, and continuing to hold the secret of their mixture and preparation within his own knowledge; that about the 1st of May, 1876, the plaintiff claimed to have purchased of Musser one-half interest in the receipts and formulas, including the knowledge of how to use them, for the sum of \$1,000; that afterwards, at the solicitation of the plaintiff, and of Morris, one of the other partners, he purchased of the plaintiff one-fourth of his half interest in the formulas and receipts for \$250, for which he, the defendant, executed the note in suit; that the defendant was for this note to receive copies of the receipts and formulas, with the knowledge of how to use them in business; that afterwards the defendant sold his interest in the business to one Forest, who took his place in the firm; that the plaintiff never furnished the defendant with the receipts and formulas, or with copies of them, or with any knowledge of how to use them, nor did any one else do so; that the defendant had never received anything for the note; that the sole and only consideration for which the note was given was that the defendant was to receive the receipts and formulas from the plaintiff; that the firm then had, and continued afterwards to have, the use of the receipts and formulas in its business; that it was with the consent of the plaintiff that Forest purchased all the interest of the defendant in the business and took his place in the firm; that the defendant took from Forest a written obligation indemnifying him against all claims of the plain-

Booth v. Fitzer.

tiff, including the note in controversy, and against all loss on account of the chemical works.

Forest testified that after he had purchased the interest of the defendant in the chemical works, and about the time the note in judgment was coming due, he went to the plaintiff with one Runnells, who had purchased a similar interest in the ownership and business of the chemical works, to get copies of the receipts and formulas; that Runnells, on behalf of himself and the said Forest, explained to the plaintiff the purpose for which they had come to see him; that the plaintiff thereupon, with apparent reluctance, however, took the book containing copies of the receipts and formulas from his pocket and was about to give it to the said Runnells and Forest when Musser, who was present, stepped up to him and said, substantially, "Fitzer, at the time I sold these receipts and formulas to you, you took an oath not to reveal the secret they contain to any one else, and now you are about to break your contract with me;" that Musser then took the book out of the plaintiff's hands and put it into his own pocket; that after this the plaintiff refused to deliver up copies of the receipts and formulas and that so far as Forest, the witness, was concerned, he had never received copies of those documents, or any knowledge of the information they contained, from the plaintiff or any one else.

Runnells corroborated Forest as to the demand upon the plaintiff for copies of the receipts and formulas, and as to the circumstances under which the plaintiff refused to comply with the demand. He also testified as to his inability to get copies of the receipts and formulas, or any information as to what they contained.

The plaintiff denied that Forest and Runnells had made a demand upon him for copies of the receipts and formulas, as they claimed to have done; but admitted that he had never furnished the defendant with such copies, and that he had, as a part of his contract with Musser, taken an oath not to divulge to any one else the information embraced in the receipts and

Booth v. Fitzer.

formulas, insisting only that he had reserved an exception in favor of his partner, or successor in business. He did not claim that he had been ready, or had ever been at liberty, to deliver copies of the receipts and formulas to the defendant, or to Forest, as his vendee. Nor did he deny that Musser had prevented him from delivering such copies to Runnells and Forest, and that there was a question as to his right to sell and make public the information contained in the receipts and formulas.

On being recalled, the defendant stated that he had never heard anything about the plaintiff having taken an oath not to reveal the knowledge which the receipts and formulas would impart, nor any question as to the plaintiff's right to sell an interest in these receipts and formulas, until after Runnells and Forest tried to get copies of them, as above testified to by the said Runnells and Forest.

Except upon the single point of a formal demand upon the plaintiff by Runnells and Forest for copies of the receipts and formulas, we have not been able to observe any palpable conflict in the evidence.

If the plaintiff's right to sell an interest in the receipts and formulas had been unquestioned, proof of a demand for copies would perhaps have been necessary to a complete establishment of the defence set up against the note; but the evidence appears to us to have shown a condition of affairs which would have rendered a demand unavailing, and it is a familiar rule that where such a condition of affairs is shown, proof of a demand is unnecessary.

The plaintiff claimed only the right to dispose of an interest in the receipts and formulas, either to his partner or successor in business, and this right was denied by Musser, the original owner, and seemingly not insisted upon by the plaintiff over the objection of Musser. Consequently, the inquiry as to whether Forest made a demand upon the plaintiff for copies of the receipts and formulas involved a question not material to the merits of the cause as it went to the jury, and concern-

Booth v. Fitzer.

ing the evidence upon which we need not express any opinion here.

We have no brief from the appellee, and hence no suggestion from him as to any theory upon which the proceedings below can be sustained.

We think the defence set up by the appellant was fairly sustained by the evidence, and that the court below erred in holding otherwise, when ruling upon the sufficiency of the evidence to sustain the verdict.

The judgment is reversed, with costs, and the cause remanded for a new trial.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—We have again given the evidence in the record a careful examination. As we view it, there is absolutely no conflict upon the question as to what constituted the consideration of the promissory note upon which the appellee's complaint is based. All the evidence supports the contention of the appellant that the consideration was that he should receive a knowledge of the manner in which certain chemical preparations were compounded. The evidence is equally conclusive that he never did receive this knowledge.

Parties have a right to fix the consideration of their contract, and if there is an entire failure or want of consideration, no recovery can be had upon the contract. In this case, the agreed consideration was the revelation to the appellant of Musser's secret of preparing the chemical compounds manufactured by the Musser Chemical Works. This consideration the maker of the note never received, and no action can, therefore, be maintained by the payee.

It makes no difference that the note was given for another's interest, provided the consideration was the payee's promise to impart the secret of preparing the chemical compounds.

There is one point upon which there is a conflict, although upon that the preponderance is strongly with the appellant. The appellee swears that there was no demand for the formu-

Booth v. Fitzer.

las, while all the other witnesses swear that there was; but strong as this preponderance is, we should be compelled to decline to interfere if it were essential to the defence that a demand should be proved. We have no disposition to trench upon the rule that this court will not reverse upon the ground that the verdict is contrary to the evidence, if there is any evidence sustaining the verdict.

We think no demand was necessary. It is a familiar rule that where it plainly appears that a demand would be unavailing, or where a party by his acts waives a demand, none need be shown. The evidence in this case shows that a demand would have been unavailing.

But the case is one in which no demand is necessary, whether it would have been unavailing or not. The consideration of the note was the communication of the secret of making the chemical preparations received by Fitzer from Musser. The payee was as much bound to impart this knowledge as the merchant to deliver goods for which he has received his customer's note. With quite as much propriety might a master, who has received from his pupil a note for teaching him some branch of mechanics, recover upon it without having rendered the stipulated services. We do not, of course, mean to say that the payee of a note is in the first instance bound to prove consideration; nor do we mean to say that if the maker had done some act rendering it impossible for the payee to render the agreed consideration, the latter would not be entitled to recover. Neither of these questions is before us. We have in hand a case where the payee of the note was bound to teach the maker a certain mystery, and where the mystery was not taught and no excuse shown for not teaching it. The evidence shows that the maker of the note was ready and willing to receive the information bargained for; that the payee knew this; and showing this it shows a case where no formal demand was necessary.

Petition overruled.

 McQueen *et al.* v. The State.

No. 10,072.

MCQUEEN ET AL. v. THE STATE.

CRIMINAL LAW.—Robbery.—Description of Property.—Where, in a prosecution for robbery, the indictment shows that a more particular description of the property taken can not be given, it will not be quashed for want of a particular description.

SAME.—Motion in Arrest of Judgment.—An indictment which sufficiently describes a part of the property taken, where several articles are severally described, will be sustained on a motion in arrest of judgment.

SAME.—Evidence.—Character of Defendant for Honesty.—Presumption.—Instruction.—In a prosecution for robbery it is not error to refuse to instruct that, "in addition to the evidence upon the subject of character, the law presumes that the character of the defendant for honesty is good."

SAME.—An instruction in such prosecution, that evidence of the defendant's character for honesty should be considered by the jury as tending to establish a defence, but if they should be satisfied beyond a reasonable doubt of his guilt, after a consideration of all the evidence, including the testimony in regard to his character for honesty, then, though they might believe he had such character before the robbery, it would not avail him as a defence or entitle him to an acquittal, is correct.

PRACTICE.—Interrogatories by Juror to Witness.—Exception.—Where no objection is made to interrogatories propounded to a witness by a juror, nor any exception reserved, no question is presented for the decision of the Supreme Court as to the admissibility of such interrogatories.

From the Dubois Circuit Court.

E. A. Ely and *J. L. Britz*, for appellants.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *A. H. Taylor*, for the State.

ELLIOTT, J.—It is contended that the information upon which the appellants were tried and convicted of the crime of robbery does not sufficiently describe the property alleged to have been feloniously taken from the person upon whom the offence was committed. The description reads thus: "One note, circulating as money, of the denomination and value of ten dollars, a more particular description of which note is to this affiant unknown and can not be given; one note, circulating as money, of the denomination and value of five dollars, a more particular description of which is unknown and

89	78
126	49
82	72
130	68
82	72
131	572
89	72
136	206

McQueen *et al.* v. The State.

can not be given ; twenty-four pieces of silver coin, of American coinage, of the value of one dollar each. All of said described money being of the aggregate value of thirty-nine dollars."

We think that an excuse is shown for not describing the notes with more certainty. Where it is shown, as it is here, that a more particular description can not be given, the indictment will be upheld. *Commonwealth v. Sawtelle*, 11 Cush. 142 ; *State v. Taunt*, 16 Minn. 109 ; *People v. Bogart*, 36 Cal. 245. It would be unreasonable to expect one who is robbed of money, or its representative, to give an accurate description of it, and it would render it almost impossible to convict a thief or a robber if courts should undertake to require the prosecutor in all cases to give a particular description of the money or note feloniously taken. The failure to give an exact description can never endanger the liberty of an innocent man, but the enforcement of such a rule as that for which counsel contend would furnish the guilty with ready and easy means of escape.

We need not stop to enquire whether the coin is well described, for there is a sufficient description of property enough to constitute the crime of robbery. An indictment good as to part of the property, where separate articles are severally described, will repel a motion in arrest. An indictment good in part will be sustained.

It is claimed that one of the jurors was guilty of misconduct in propounding interrogatories to one of the witnesses for the State. No objection was made, nor was any exception reserved, and consequently no question is presented for our consideration.

The appellants asked an instruction upon the subject of character, which contains the following clause: "In addition to the evidence upon the subject of character, the law presumes that the character of the defendants for honesty is good." The court did not err in refusing this instruction. Character is to be determined from the evidence presented to the jury.

McQueen et al. v. The State.

It is a question of fact, depending for its solution upon the evidence. If the defendant offers no testimony upon that subject, then it forms no element of the case; if he does, then it must be determined upon that testimony, considered in connection with all the other evidence in the case.

The sixth instruction given by the court reads as follows: "Some evidence has been offered by the defendants in regard to their character for honesty. This evidence should be considered by the jury as tending to establish a defence. If, however, the jury should be satisfied, beyond a reasonable doubt, of the guilt of the defendants, after a full consideration of all the evidence in the case, including the testimony in regard to the character of the defendants for honesty, then, in that view of the case, though the jury might believe that the defendants had a good character for honesty before the alleged robbery, that would not avail them as a defence, or entitle them to an acquittal." We think this instruction contains a correct statement of the law.

It is true that evidence of character is to be taken into consideration in all cases, not simply in doubtful ones, in determining the guilt or innocence of one accused of crime. *Kistler v. The State*, 54 Ind. 400. The instruction so declares, for the jury are told that they are to consider the evidence of character as tending to establish a defence, and that such testimony must be considered in determining the question of guilt or innocence. Good character may sometimes turn the scale in a defendant's favor, and it is always to be considered in connection with all the other evidence in the case. Where, however, taking into consideration the good character of the accused, guilt is established, then conviction must follow. As was said by WORDEN, J., in *Rollins v. The State*, 62 Ind. 46, "Previous good character does not license the commission of crime."

We can not disturb the verdict upon the evidence.
Judgment affirmed.

Hadley et al. v. Hadley.

No. 9121.

HADLEY ET AL. v. HADLEY.

REPLEVIN.—Execution.—Sheriff.—Possession.—Where a sheriff levies on goods of another than the defendant in the execution, and upon receiving a delivery bond from the owner (without provision therein that the debtor may sell the goods and apply the value on the execution) leaves them in his possession, the sheriff still has such constructive possession as will justify replevin under the statute, R. S. 1881, section 1266, and it is error in such case to instruct the jury that if the possession was not in the sheriff when the suit was begun the verdict should be for the defendant.

SAME.—Fraud.—If one combine with another to defraud the creditors of the latter, it does not result that the property of the former is subject to execution against the latter.

VERDICT.—Interrogatories.—A jury can only be required to answer interrogatories in case they find a general verdict, without instruction as to the party in whose favor it shall be.

EVIDENCE.—Assessment List.—Ownership of Property.—Declarations.—Assessor.—Where the assessment list of a husband is put in evidence, showing property, claimed in the suit by his wife, to have been listed by the husband in his own name, with a view to contradict his testimony as a witness given on the trial, it is proper in his support to show by the assessor that at the time of making the list he stated that his wife owned the property.

From the Hendricks Circuit Court.

C. C. Nave, for appellants.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellee.

MORRIS, C.—This is an action of replevin brought by the appellee against the appellants.

The complaint states that the appellee is the owner and entitled to the possession of certain personal property, which is particularly described in the complaint, and alleged to be of the value of \$880. It is also stated that John M. Emmons, as sheriff of Hendricks county, Jesse Hadley and John Atkinson have possession of said property without right, and unlawfully and wrongfully detain the same from the appellee. Judgment for the recovery of the possession of said property and fifty dollars damages for its detention is demanded. A proper affidavit and bond were filed by the appellee.

Hadley et al. v. Hadley.

The appellants answered the complaint in three paragraphs. The first was a denial of the facts stated in the complaint and affidavit, and as, under this paragraph, the facts alleged in the special paragraphs were provable, no further notice will be taken of the answer.

The cause was submitted to a jury for trial, who returned a verdict for the appellee.

The appellants moved the court for a new trial. The motion was overruled, and judgment rendered for the appellee.

The errors assigned are as follows:

"1. The court erred in overruling the appellants' written request that, if the jury should find a general verdict for the appellee, they should find who was in the possession of the property claimed by the appellant at the commencement of the suit.

"2. The court erred in overruling the appellants' motion for a new trial.

"3. The court erred in refusing to charge the jury as requested by the appellants."

No question is presented for decision under the first and third assignments. If the court refused to require the jury to answer the interrogatories as to the possession of the property in controversy, or refused to instruct the jury as requested by the appellants, such refusal, if the request was in proper form, or the instructions asked should have been given, would be a sufficient reason for a new trial, and if there was error in such refusal, it could only be taken advantage of by a motion for a new trial.

The grounds upon which a new trial was asked are as follows:

"1. Because the court erred in permitting Hugh Jessup to contradict his assessment list of the property of Amos Hadley, made by him in the year 1879, by stating that the property specified therein, consisting of two mares, 63 head of sheep, 7 head of hogs, a cow and calf, a lot of hay, was the property of Sallie Hadley, and that Amos Hadley so told him at the time of listing said property.

Hadley et al. v. Hadley.

"2. Because the court erred in allowing Hugh Jessup, the assessor of Guilford township, under his affirmation, to contradict the assessment list by him made out, and affirmed to by Amos Hadley, in the year 1880, containing a list of the taxable property of Amos Hadley, for the year 1880.

"3. Because the court erred in refusing to give each and all of the instructions requested by defendants, numbered 1, 2, 5 and 6.

"4. Because the verdict of the jury is not sustained by sufficient evidence.

"5. Because the verdict of the jury is contrary to law.

"6. Because the court erred in refusing to require the jury, if they found a general verdict for the plaintiff, they should then find specially to interrogatories or questions numbered 1, 2, and 3."

There was no error in permitting the witness Jessup to testify as to the statements made by Amos Hadley at the time he listed his property. Assuming that the assessment list was properly admitted in evidence, as containing statements contradictory of the testimony of Amos Hadley, as a witness in the case for the appellee, what he said at the time of making the list as to his ownership of the property, was clearly competent. His statement then made to the assessor, Jessup, that his wife, the appellee, owned the property listed, supported or tended to sustain his testimony as given on the trial, and was, for this purpose, clearly competent. This disposes of the first and second reasons upon which a new trial is asked.

The third ground for a new trial is the refusal of the court to give instructions 1, 2, 5 and 6, asked by the appellants. These instructions are as follows:

"1. If the jury are satisfied from the evidence given on the trial of this cause, under the issues in said cause, that the property claimed by the plaintiff as his property was not, at the time of the commencement of this suit, in the possession of the defendants, then the jury should find a verdict in favor of the defendants and against the plaintiff.

Hadley et al. v. Hadley.

"2. If the jury are satisfied from the evidence given in the cause, that the personal property described in the complaint and affidavit of the plaintiff was not, at the time she commenced her suit, in the possession of said defendants, but was then in the possession of the plaintiff and her husband, Amos Hadley, or either of them, then and in that case you ought to find a verdict in favor of the defendants against said plaintiff, and also find the value of the property sought to be replevied.

"5. The court will further charge the jury that if, from the evidence given in this cause, they are satisfied that the property claimed and sought to be replevied by the plaintiff was not in the possession of the defendants at the date of the commencement of this suit, then and in that case the jury will find the value of the property and need not find any verdict as to who was the owner of said property or any part thereof at the time of the commencement of the suit.

"6. If the jury believe, from the evidence given in the cause, that the plaintiff and her husband (Amos Hadley) did combine and confederate together to hinder and delay or to prevent the defendants Jesse Hadley and John Atkinson, from collecting their judgment off of her husband, Amos Hadley, or any part thereof, then and in that case you ought to find in favor of the defendants, as fraud vitiates all contracts."

The testimony showed, or tended strongly to show, that the property in dispute belonged to the appellee; that the appellant Emmons, having in his hands as sheriff of Hendricks county, an execution issued out of the Hendricks Circuit Court, on a judgment against Amos Hadley, the husband of the appellee, in favor of the appellants Jesse Hadley and John Atkinson, by their direction levied the execution upon the property in dispute, endorsed a schedule of the property levied upon on the back of the execution; that he did not remove the property, but left it where he found it, upon the execution of a delivery bond by the appellee and her husband; that the property was thus in their possession at the time the suit was commenced. Under these circumstances, according to the

Hadley *et al.* v. Hadley.

principles held in the case of *Louthain v. Fitzer*, 78 Ind. 449, the appellants had such constructive possession of the property as would enable the appellee to maintain this action.

In view of the testimony, we think the first and second instructions asked were properly refused.

The jury would understand the word "possession," as used in these instructions, to mean the actual possession, and as not embracing that constructive possession which, in the case just referred to, is held to be a sufficient basis to support this action. We think the instructions misleading, and not, in the sense in which they would have been understood by the jury, applicable to the facts proven in the cause.

There was no error in refusing the fifth instruction asked by the appellant. It said to the jury, by the clearest implication, that, if satisfied from the evidence, that the appellants were not in the possession of the property, their verdict should find, not even that fact, but only the value of the property in dispute. Such a verdict would have been altogether defective. Nor did the court err in refusing to give the sixth instruction asked by the appellants. It does not follow that, as is assumed by this instruction, if the appellee had combined with her husband to hinder and delay the appellants in the collection of their judgment, they could, therefore, rightfully levy upon and sell the property of the appellee for the satisfaction of their demand.

We think there was no error in refusing to grant a new trial on the ground that the verdict was not sustained by sufficient evidence, and was contrary to law.

The evidence tended to show that the property in dispute belonged to the appellee; that it had been taken by the appellants on an execution against Amos Hadley, the husband of the appellee; that after the property was so levied upon, the sheriff, Emmons, took from the appellee and her husband, the execution debtor, a bond for its safe-keeping and delivery to the sheriff at any time upon demand.

The taking of this bond was itself an assertion of a power

Hadley *et al.* v. Hadley.

over and right in the property levied upon, and by the terms of the bond this power and right of control are continued and secured. By the terms of the bond, Amos Hadley, the only party legally bound, held the property for the appellants, to be surrendered to the sheriff at any time upon demand. Through this bond the sheriff continued to assert his power and control over the property in dispute, the possession of which he had a right to resume at his will. It may be noticed in this case that the bond does not, as is usually the case, give the debtor, Amos Hadley, the right to dispose of the property, by applying the proceeds or its value upon the execution.

The facts in this case are substantially the same as in the case of *Louthain v. Fitzer*, *supra*, to which, and the authorities there cited, we refer. Section 128 of the code, which gives the owner or claimant of property, taken on execution or attachment against another, the right to bring an action for its possession, may be regarded as a proceeding to try the right of property as between the parties, and not merely as a remedy for the recovery of actual possession of it. The actual possession may be secured by a delivery bond, but the contention as to the right of possession remains. So far as possession in the officer may be deemed necessary in order to try, in this form of action, the right of property, there seems to be great propriety in holding that the officer, who has taken a bond for the delivery of the property, is still constructively in possession of it, unless it shall be shown that through the acts of the obligor or party entrusted with possession of it, it has passed beyond and out of the officer's power and control. The verdict was, we think, supported by sufficient evidence, and was not contrary to law.

The court did not err in refusing a new trial on the ground that it had erred in refusing to require the jury to answer the interrogatories propounded by the appellants. Assuming that the interrogatories are properly in the record, yet the request was not in proper form. The request was not that the court should require the jury, in case they should find a

The State v. First.

general verdict, to find specially in answer to the interrogatories, but to require the jury, in case they should find a general verdict for the appellee, to answer specially, etc. It would have been error to comply with this request. *Pitzer v. Indianapolis, etc., R. W. Co.*, 80 Ind. 569. There was no error in refusing to comply with such a request.

This disposes of all the questions in the record. The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

No. 10,233.

THE STATE v. FIRST.

CRIMINAL LAW.—Practice.—Information.—Under section 1679, R. S. 1881, an information as well as an affidavit is necessary to an original prosecution for crime, and if there be no information, and no offer to file one, the cause may be ended by quashing the affidavit.

From the Huntington Circuit Court.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *C. W. Watkins*, Prosecuting Attorney, for the State.

WORDEN, C. J.—The record in this case, after showing the meeting of the court on the 3d day of January, 1882, recites as follows:

“Be it remembered, that heretofore, to wit, on the 30th day of November, 1881, there was filed in the office of the clerk of the Huntington Circuit Court, the following affidavit, to wit:

“STATE OF INDIANA, HUNTINGTON COUNTY, ss:

“Before John B. Hults, a justice of the peace in and for Salamonie township, in said county.

The State v. First.

"State of Indiana v. Jacob H. First. Affidavit for intoxication.

"Jacob C. Wemmer, being duly sworn, on his oath says that one Jacob H. First, late of said county, on the 20th day of November, A. D. 1881, at said county and State aforesaid, did then and there unlawfully appear upon the public streets of the town of Warren, in said county, and was then and there found unlawfully in a state of intoxication, contrary," etc.

[Signed.]

"JACOB C. WEMMER.

"Subscribed and sworn to this 24th day of November, 1881.

"JOHN B. HULTS,

"Justice of the Peace."

The defendant appeared in court, and also the prosecuting attorney, and the defendant moved to quash the affidavit, which motion was sustained, and the prosecuting attorney excepted. This ruling is complained of as erroneous.

We are not advised by the record upon what ground the affidavit was quashed.

There are some indications on the face of the affidavit, that it was intended as the foundation of a prosecution before a justice of the peace, before whom no information would be necessary in addition to the affidavit. But no prosecution appears to have been had before a justice of the peace. No transcript from any justice appears in the record, nor does the case appear to have been appealed from any justice.

The inference from the recital of the record is that the affidavit was filed in the circuit court as the commencement of an original prosecution in that court; and we must regard the prosecution as originally commenced in that court.

An information was necessary in the circuit court in a prosecution commenced in that court, in addition to the affidavit; and a prosecution upon affidavit alone in such case can not be maintained. R. S. 1881, sec. 1679.

Conceding that the affidavit was sufficient as such, still, as the prosecution could not be maintained upon it alone, and as the State did not file or offer to file any information, no

The Bloomfield Railroad Company v. Burress.

error was committed in quashing the affidavit. Standing alone, it was insufficient to put the defendant upon trial, and he had the right to have the prosecution disposed of and ended.

The judgment below is affirmed.

Petition for a rehearing overruled.

No. 9288.

THE BLOOMFIELD RAILROAD COMPANY v. BURRESS.

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JUDGMENT.—*Misnomer of Party.*—*Abatement.*—A defendant who is sued by a wrong name, is served with process, and fails to plead the misnomer in abatement, is bound by the judgment.

SAME.—*Action Upon Judgment.*—*Complaint.*—In an action upon a judgment, an averment in the complaint, that the judgment was rendered against the defendant by another name, is sufficient to show that he is bound by the judgment.

SAME.—*Record.*—*Dismissal.*—*Appearance.*—*Default.*—*Presumption.*—*Supreme Court.*—Where the record shows the dismissal of an action for want of prosecution, and afterwards the defendant's withdrawal of his appearance, a default and judgment rendered against the defendant, the Supreme Court will presume, the record showing nothing upon the subject, that the cause was properly reinstated.

SAME.—*Collateral Attack.*—*Jurisdiction.*—Where a domestic judgment is collaterally attacked, and the record is silent upon the subject, jurisdiction of the person will be presumed.

From the Greene Circuit Court.

A. G. Cavins, E. H. C. Cavins, T. L. Sullivan and A. Q. Jones, for appellant.

E. E. Rose and E. Short, for appellee.

BEST, C.—The appellee brought this action against the appellant, alleging in the first paragraph of his complaint, that on the 18th day of March, 1876, he brought an action in the Greene Circuit Court against the appellant by the name of the St. Louis, Bloomfield and Louisville Railroad Company, a name by which the appellant was well known; that

The Bloomfield Railroad Company v. Burress.

a summons was issued and served upon the president of the appellant who employed counsel to defend the action, and who caused an appearance to be entered and an answer to be filed; that afterward the appellant withdrew its appearance, was defaulted, and upon due proof the court rendered a judgment against the appellant by the name of the St. Louis, Bloomfield and Louisville Railroad Company, for the sum of \$360, which judgment remains wholly unpaid. Wherefore, etc.

A demurrer for want of facts was overruled to the first paragraph of the complaint, and an answer in denial was filed.

The cause was submitted to the court for trial and a finding made for the appellee upon the first, and against him upon the second paragraph of the complaint.

A motion for a new trial and a motion in arrest of judgment were overruled, and final judgment was rendered for the appellee.

From this judgment the appellant appeals and assigns as error the orders of the court in overruling the demurrer to the first paragraph of the complaint, in overruling the motion for a new trial, and in overruling the motion in arrest of judgment.

The objection urged to the complaint is that it shows upon its face that the judgment sought to be enforced was not recovered against the appellant. We think the objection is not true in point of fact. The complaint avers that the judgment was recovered against the appellant, but by a wrong name. This, however, does not affect its validity. If a party is sued by a wrong name, is served with process, and fails to plead the misnomer in abatement, the judgment will bind him. *Lafayette Ins. Co. v. French*, 18 Howard, 404; *Guinard v. Hey-singer*, 15 Ill. 288; *Hammond v. People*, 32 Ill. 446, 473; *Freeman Judgments*, section 154.

In *Lafayette Ins. Co. v. French*, *supra*, the court said: "It was objected that the judgment recovered in the commercial court was against 'the president, directors, and company of the Lafayette Insurance Company,' while this action is against the

The Bloomfield Railroad Company v. Burress.

'Lafayette Insurance Company;' but the declaration describes the judgment correctly, and then avers that the judgment was recovered against the defendants by that other name. We must assume that this fact was proved; and the only question open here is, whether, if a mistake be made in the name of a defendant, and he fails to plead it in abatement, the judgment binds him, though called by a wrong name. Of this, we have no doubt. Evidence that it was an erroneous name of the same person must, therefore, be admissible; otherwise, a mistake in the defendant's name, instead of being available only by a plea in abatement, would render a judgment wholly inoperative."

The averment in the complaint, that the judgment described was rendered against the appellant by another name, was sufficient to show that it was bound by the judgment, and for this reason the demurrer to the first paragraph of the complaint and the motion in arrest of judgment were properly overruled.

The reasons embraced in the motion for a new trial are, that the finding was not sustained by sufficient evidence and was contrary to law.

The evidence shows that the appellee, at the March term, 1876, of the Greene Circuit Court, commenced an action against the appellant, by the name of the St. Louis, Bloomfield and Louisville Railroad Company, for a personal injury received while being carried upon its cars; that a summons was served upon the president of the appellant, and that its attorneys appeared and filed an answer in the cause; that, at the June term, 1876, the cause was dismissed for want of prosecution, and at the October term was continued; that, at the January term, 1877, the appellant withdrew its appearance, and it was defaulted and a judgment was rendered for \$360—all of which was done in the name of the St. Louis, Bloomfield and Louisville Railroad Company; that at the time the suit was commenced there was no such corporation in existence as the St. Louis, Bloomfield and Louisville Railroad Company, but it was

The Bloomfield Railroad Company v. Burress.

supposed that the appellant had consolidated with another railroad corporation, under such name, and hence the suit was brought against it by such name.

This evidence abundantly supported the averment that the judgment described was rendered against the appellant.

It is, however, insisted that, as the suit was dismissed, the judgment thereafter rendered was a nullity, and did not support the finding.

This position would be unanswerable were it not for the fact that the record shows the appellant in court after the dismissal of the cause. It does not appear affirmatively that the judgment of dismissal was set aside and the cause reinstated, nor does the contrary appear; and, therefore, we must presume in favor of the action of the court, that such order was made, and that the court had jurisdiction of the person of the appellant. *Hawkins v. Hawkins*, 28 Ind. 66.

The validity of that judgment is here questioned collaterally, and it is well settled that in such case, where the record discloses nothing upon the point, jurisdiction of the person will be presumed. *Horner v. Doe*, 1 Ind. 130; *Gerrard v. Johnson*, 12 Ind. 636; *Gale v. Parks*, 58 Ind. 117.

In addition to this, the record recites the summons originally issued, as showing that the appellant had been duly served with process, so as to authorize the default, and this fact strongly supports the presumption that the cause had been properly reinstated. The court and parties seem to have so treated it and we must so regard it.

The motion for a new trial was properly overruled, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at appellant's costs.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

 Stephenson *et ux.* v. Ballard *et al.*

No. 5975.

STEPHENSON ET UX. v. BALLARD ET AL.

MECHANIC'S LIEN.—*Married Woman.*—*Statutes Construed.*—Section 5116, R. S. 1881, forbids a wife to encumber her lands save by deed in which the husband joins; but the later statutes (section 5293, *et seq.*) provide for a mechanic's lien generally, and construing them together, giving the later effect when in conflict with the former, a married woman may create such lien, like a *feme sole*.

SAME.—*Notice.*—*Time of Filing.*—*Contract.*—A lien for labor and materials in repairing a building, upon an entire contract, may be acquired by filing the notice within sixty days after the last work is done.

SAME.—*Husband and Wife.*—*Pleading.*—*Practice.*—In a suit against husband and wife to enforce a mechanic's lien upon lands of the wife, where the husband answers separately that he made the contract without the wife's knowledge or consent, and paid for the same a sum named which was accepted as payment, it is error to strike the answer out, so much of it as alleges payment being pertinent.

SAME.—*Payment.*—*Pleading and Proof.*—Proof of payment is not admissible under the general denial, in a suit to enforce a mechanic's lien, nor need the plaintiff prove non-payment though he must aver it.

PRACTICE.—*Judgment.*—*Supreme Court.*—Objection to the form of a judgment can not be made, for the first time, in the Supreme Court.

SAME.—*Evidence.*—After a pleading has been stricken out, there is no error in rejecting evidence which would only have been admissible under it.

BILL OF EXCEPTIONS.—*Practice.*—*Record.*—A bill of exceptions, otherwise regular on its face, which concludes with the words "to be agreed to by counsel," the signature of the judge then following, with no explanatory proof, will be regarded as properly in the record.

From the Boone Circuit Court.

F. M. Charlton and *W. W. Spencer*, for appellants.

H. C. Wills, for appellees.

BICKNELL, C. C.—In this case a mechanic's lien was claimed for materials furnished and work done in repairing a frame dwelling-house. The action was brought by the contractors, who did the work and furnished the materials, against a man and his wife.

The wife was alleged to be the separate owner of the property, and the maker of the contract. There was a trial by jury, with a verdict for the plaintiffs, followed by a judgment

Stephenson *et ux.* v. Ballard *et al.*

for the enforcement of the lien. The defendants appealed. A demurrer to the complaint was overruled; the first error assigned is the overruling of this demurrer.

Although, by the act of May 31st, 1852, 1 R. S. 1876, p. 550, section 5, a wife is forbidden to encumber her land, except by deed in which her husband shall join, yet the mechanic's lien law, a later law, passed June 18th, 1852, 2 R. S. 1876, p. 266, and its amendments, provide for such a lien against land-owners generally.

These two acts must be construed together if possible; if there be any conflict between them, the later must prevail. *Shilling v. Templeton*, 66 Ind. 585; *Vail v. Meyer*, 71 Ind. 159. It is not necessary now, in a complaint against a wife upon a mechanic's lien, to aver that she intended to charge her property, nor that the improvement was necessary to the full enjoyment of the property. *Vail v. Meyer*, *supra*. When work has been done or materials furnished under a contract, express or implied, the law gives the lien; whenever the woman would be personally liable, if she were a *feme sole*, then the lien arises. *Capp v. Stewart*, 38 Ind. 479; *Jones v. Pothast*, 72 Ind. 158.

The appellants insist that the complaint in the present case is bad, because, as they say, it does not show that the notice of lien was filed within sixty days after the materials were furnished.

Upon this the law is, that, where a person builds a complete and entire building for another, whether he furnishes the materials or not, he may acquire a lien by filing his notice within sixty days after the completion of the building; but where one performs work upon, or furnishes materials for, a part only of a building, he must file his notice within sixty days from the completion of the work or the furnishing of the materials. *Hamilton v. Naylor*, 72 Ind. 171; *Lawton v. Case*, 73 Ind. 60. In the case at bar, the claim is for work and also for materials in repairing a dwelling-house, and the suit is by the original contractors, who did the work and furnished

Stephenson et ux. v. Ballard et al.

the materials under one entire contract, and the notice was filed within sixty days after the last work done, but not within sixty days after the materials were furnished; they were furnished two months before the last work was done. In such a case, upon such an entire contract, the statute is satisfied if the notice is filed, as it was in this case, within sixty days after the last work done. There was no error in overruling the demurrer to the complaint.

The defendants answered jointly by a general denial. The defendant Samuel Stephenson answered separately, that he was the husband of his co-defendant, and that he and his family were living on the premises, and that he, without his wife's knowledge or consent, made the contract with the plaintiffs, and that they accepted and received from him for said labor and materials \$211 as payment.

On motion of the plaintiffs, the foregoing separate answer was stricken out. This action of the court is the second error assigned by the appellants.

So much of the answer as states that the husband made the contract, without the knowledge or consent of the wife, was embraced in the general denial already pleaded, and that part of the answer might well have been stricken out; but the answer contains an allegation of payment. The husband, being a defendant, had a right to plead that the debt sought to be enforced by the sale of his wife's land, which he was occupying and a part of which he was capable of inheriting, had been paid.

It has been decided that, where husband and wife are sued and separate answers are filed on which issues are joined, the husband is a competent witness in his own behalf, notwithstanding that his evidence may enure to the benefit of his wife. *Haskit v. Elliott*, 58 Ind. 493; *Sutherland v. Hankins*, 56 Ind. 343; *McConnell v. Martin*, 52 Ind. 434; *Rogers v. Rogers*, 46 Ind. 1. Yet even if it were true that such a plea of payment could not be proved by the testimony of the husband, it might be proved by other testimony.

Stephenson et ux. v. Ballard et al.

The complaint avers non-payment of the debt, but proof of that averment is not required, and the general denial does not put such an averment in issue, the husband could not avail himself of the defence of payment without pleading it. *Hubler v. Pullen*, 9 Ind. 273. The court, therefore, erred in striking out the separate answer of Samuel Stephenson.

The third error assigned is, that the court below erred in refusing to allow the defendant Samuel Stephenson to testify in his own behalf. This is not a valid assignment; the matter of it belongs to the motion for a new trial.

The fourth error assigned undertakes to impeach the form of the judgment, but this assignment is not available, because there was no objection to the judgment, and no motion was made to correct it or to modify it. *Martin v. Martin*, 74 Ind. 207.

The last error assigned is overruling the motion for a new trial.

The reasons for this motion are, that the verdict is contrary to law, and not sustained by the evidence, and that the court refused to allow the defendant Samuel Stephenson to testify in his own behalf.

He "was offered as a witness in his own behalf to prove a contract and settlement by him with plaintiffs for said work." There was no error in refusing to receive such testimony; after his separate answer was stricken out there was no issue on which such testimony was admissible. The cause was tried while the act of March 11th, 1867, 2 R. S. 1876, p. 132, was in force. As the judgment must be reversed for the error of the court in striking out the separate answer of Samuel Stephenson, it is unnecessary to consider the other reasons for a new trial.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to the court below

Stephenson *et ux.* v. Ballard *et al.*

to overrule the motion to strike out the separate answer of the defendant Samuel Stephenson.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—This cause was reversed for error in striking out the answer of the defendant Stephenson.

The answer was set out in a bill of exceptions.

The appellee insists that the bill ought not to have been regarded as part of the record. He says it was signed upon condition, and he refers to *Stewart v. Rankin*, 39 Ind. 161, and *Cluck v. State*, 40 Ind. 263.

In the first of these cases the bill of exceptions was signed by the judge in blank, and did not contain the evidence, and it appeared that the judge had never seen the evidence.

It was therefore held that the evidence which had been copied by the clerk into another part of the record, and which was referred to in the bill of exceptions by the words "see pages 18 to 28," etc., was not part of the bill of exceptions, and was not properly in the record.

In the second of the cases referred to, the bill of exceptions contained the statement, "this was all the evidence given in the cause," followed by the direction "insert reporter's notes," and ending thus, "signed and sealed within the time allotted."

Signed by the Judge.

"It is agreed that the evidence, before this bill shall be of any effect, shall be revised and corrected by the attorney for the prosecution."

Signed by the Judge.

The bill in this case was strongly criticised by this court, but it was not rejected, although a motion had been made to strike it from the record. The case was decided upon the evidence in said bill presented.

There is no analogy between the case at bar and either of the foregoing cases.

Here, the bill of exceptions was not signed in blank; it had no expressed condition that it should be "revised and corrected;" it was signed by the judge; it contained all the ev-

Dick v. Hitt.

idence; it was in the common form, and was shown to have been filed within the time allowed by the court.

Under the date of it, are the words "to be agreed to by counsel;" then follows the signature of the judge in its ordinary place. In the absence of any evidence, the legal presumption is that the judge did his duty. There was no motion to reject this bill of exceptions; if it was proper to consider the evidence in the case of *Cluck v. State, supra*, a *fortiori* it was proper to consider the evidence here; the mere existence upon the bill of the words above stated, without any proof as to the manner in which they were placed there, or as to their purpose, and without any showing that the bill was not agreed to by counsel, does not overcome the legal presumption that the judge did his duty and signed the bill, "having convinced himself, either by the consent of opposing counsel, or by a personal examination, that it contained the truth."

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

No. 9429.

DICK v. HITT.

PROMISSORY NOTE.—*Insolvent Maker.*—*Exemption.*—*Recovery Against Assignor.*—In an action against the assignor of a promissory note not payable in bank, the plaintiff is entitled to recover upon proof that the maker has no property not exempt from sale on execution.

PRACTICE.—*Evidence.*—*Prima Facie Case.*—When the party having the burden of the issue has given evidence making a *prima facie* case, he is entitled to a finding unless it be met and overcome by evidence given by the other party.

SAME.—*Supreme Court.*—*Amended Pleading.*—*Presumption.*—The Supreme Court will presume that an amended pleading, following leave taken to amend, is properly certified as a part of the record.

From the Knox Circuit Court.

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Dick v. Hitt.

H. Burns and J. S. Pritchett, for appellant.

W. H. De Wolf and S. N. Chambers, for appellee.

ELLIOTT, J.—It is urged by the appellee that the judgment should be affirmed without considering the errors alleged by the appellant, for the reason that the original complaint was held bad on demurrer, and it does not appear that any amended complaint was filed. It is true that it is not stated in terms that an amended complaint was filed, but we find that leave was taken to amend, and also find an amended complaint in the record. Under such circumstances the only reasonable presumption is that the appellant followed out the leave granted by filing the amended complaint found in the record. It would be an unreasonable inference that would lead to the conclusion asserted by the appellee. To indulge it would be to hold that the trial court tried the cause upon a complaint to which it had sustained a demurrer. It is hardly conceivable that appellee went to trial upon a complaint which had been adjudged bad.

The controlling question in the case is: Can a recovery be had against the assignor of a promissory note not payable in bank, upon proof that the maker had no property except such as is exempt by law from sale upon execution? The trial court, by its conclusions of law and judgment, gave an answer in the negative, and, in effect, held that the plaintiff, in such a case, must not only prove that the property was less in value than that allowed by law as exempt, but must also prove that the exemption was claimed. In this the court was in error.

If the conclusion reached below is correct, then in no case can a judgment be obtained against an assignor until one has been obtained against the maker, and the exemption claimed in the manner prescribed by law. This would entail needless expense, cause useless litigation, and produce no good result. A rule likely to be productive of such consequences can not be a sound one.

Dick v. Hitt.

Prima facie, property exempt from execution will be claimed by the debtor. Everywhere the law acts upon the presumption that a man will do that which is for his own interest, and this presumption extends to the case of a debtor having a right to exempt property from sale upon execution. When the appellant proved that the property was less than the maker of the note was entitled to claim as exempt, he showed, *prima facie* at least, that the maker had no property which legal process could reach.

A plaintiff is bound only to make out a *prima facie* case. When the evidence establishes such a case, it must be met by the defendant, or judgment will be awarded the plaintiff. In the case in hand, a *prima facie* right of recovery was shown when it was made to appear that the maker of the note had no property subject to execution. There is no obligation upon such a plaintiff to resort to extraordinary measures; all he need do is to show that the maker had no property which could be reached by ordinary legal process. *Iles v. Watson*, 76 Ind. 359; *Williams v. Nesbit*, 65 Ind. 171; *Sayre v. McEwen*, 41 Ind. 109.

The precise question involved in this case has been decided in at least two cases adversely to the appellee. In *Bozell v. Hauser*, 9 Ind. 522, and *Campbell v. Gould*, 17 Ind. 133, the question was directly involved and decided. In the latter case it was said: "Although it may be said, perhaps, that the debtor must claim the exemption, avail himself of this right, and that he may by express acts, or, even implication, waive it; yet we can not perceive but that the property, when within the exemption, should be *prima facie*, for the purposes of a suit of this character, considered as beyond the reach of the regular process of the court."

The trial court, in its conclusions of law, refers to the case of *Terrell v. State, ex rel.*, 66 Ind. 570; but we find nothing in that case overruling the earlier cases, or in any respect questioning their soundness, or lending any support to the conclusions stated. That case was against a sheriff for failing to levy an execution, and the question came up on the complaint,

 Hadley et al. v. Hadley.

the sheriff contending that it was necessary for the plaintiff to show affirmatively that the debtor had property subject to execution. The distinction between that case and the present is obvious; there the officer's imperative duty was to levy the writ; he had no discretion, nor had he the right to settle any question of exemption. It was not held in that case that the sheriff might not show in defence that the property of the debtor was exempt; on the contrary, it was expressly held that, if shown, that fact would constitute a defence. The effect of the decision cited is, that, by showing a failure to levy the writ, the plaintiff made out a *prima facie* case, which the sheriff might have defeated by showing that the debtor's property was exempt.

Judgment reversed, with instructions to enter judgment in appellant's favor upon the special finding.

 No. 9122.

HADLEY ET AL. v. HADLEY.

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PRACTICE.—Bond for Costs.—Bill of Exceptions.—To bring before the Supreme Court the action of the court below in refusing to require a plaintiff to give security for costs, the motion and affidavit therefor must be brought into the record by bill of exceptions.

REPLEVIN.—Possession.—Execution.—Sheriff.—Levy.—If a sheriff, by direction of a plaintiff, who is present, levy an execution upon goods of another than the execution defendant, the goods being present and within his control, and he leave them in the custody of the execution defendant, where he found them, upon his delivery bond, without surety, the owner may, under the statute (R. S. 1881, section 1266), maintain replevin against both, though the sheriff or plaintiff personally have not actual possession of the goods at the commencement of the suit.

SAME.—Receiptor.—In such case, the execution defendant is a mere receiptor of the goods, and the possession is that of the sheriff.

From the Hendricks Circuit Court.

C. C. Nave, for appellants.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellee.

Hadley et al. v. Hadley.

MORRIS, C.—This is an action of replevin brought by the appellee against the appellants, to recover the possession of forty-five bushels of wheat, one sorrel mare, and one two-year-old heifer, alleged to be of the value of \$175, and to be unlawfully and wrongfully detained from the appellee by the appellants. The complaint, affidavit and bond are in the usual and proper form.

The appellants filed an affidavit, alleging the non-residence of the appellee, and moved the court to require him to give a bond for costs. The court overruled the motion, on the ground that the costs were sufficiently secured by the replevin bond filed.

The appellants answered by a general denial. They also filed a special answer, but as the matter specially answered was provable under the general denial, the special defence will not be particularly noticed. Trial by the court, and finding for the appellee. The appellants moved for a new trial; the motion was overruled, and judgment for the appellee.

The appellants assign as errors the rulings of the court upon the motion for a bond for costs, and upon the motion for a new trial.

It is stated in the record that an affidavit was filed, stating the non-residence of the appellee, and that a motion for a bond for costs was made, but neither the affidavit nor the motion is in the record by bill of exceptions or otherwise. The question is not, therefore, presented to this court for decision.

The evidence given upon the trial is properly in the record, and it tends to prove that the property described in the complaint, at and prior to the commencement of the suit, belonged to the appellee. It was proven that in the spring of 1880, the appellee went to the State of Kansas, leaving the property in dispute with his parents, Amos and Sallie Hadley, in Hendricks county, Indiana. It was agreed by the parties, that on the 25th day of August, 1880, the wheat, mare and heifer in controversy were in the actual possession of Amos and Sallie Hadley, in Hendricks county, Indiana; that on that day

Hadley et al. v. Hadley.

the appellant James M. Emmons, as sheriff of said county, levied upon said property by virtue of an execution duly placed in his hands as such sheriff, issued by the clerk of said court, upon a judgment rendered in the Hendricks Circuit Court, in favor of Jesse Hadley and John Atkinson, and against the said Amos Hadley, for \$227.40; that on said day the appellants Hadley and Atkinson went with the sheriff, Emmons, to the house of Amos Hadley, and directed him to levy said execution upon the property in dispute, together with other property claimed by the said Sallie Hadley, which he did, making an inventory of the property levied upon, and endorsing a schedule of the same upon said execution; that the sheriff did not take the wheat, mare and heifer into his actual possession, but would have done so had not the said Amos and Sallie Hadley executed and delivered to him the bond hereinafter set out; that said delivery bond having been executed, the said Amos and Sallie Hadley remained in the actual possession of said property from the 25th day of August, 1880, until, and ever since, the 31st day of said month, the day on which this suit was commenced, and that said property had not been in the actual possession of the appellants, or any of them. Said delivery bond is as follows:

"Jesse Hadley and John Atkinson v. Amos Hadley. In the Hendricks Circuit Court.

"We undertake that the following property" (here the property levied upon, including that in dispute, is described), "levied upon as the property of Amos Hadley, by virtue of an execution issued in the above entitled cause, by James M. Emmons, sheriff of Hendricks county, Indiana, shall be delivered to said sheriff, at the residence of Amos Hadley, in Guilford township, Hendricks county, on the — day of —, 18—, or at any time previous to said date, upon demand being made at any time between the hours of ten o'clock A. M. and four o'clock P. M., when said officer may be ready to receive the same, in as good condition as the same is

Hadley *et al.* v. Hadley.

at this date, to be sold by said sheriff, by virtue of said execution; and further, that said ——— may sell said property at private sale, and when so sold, said ——— shall pay the cash value thereof to said sheriff as aforesaid; and this undertaking is hereby made payable to the execution plaintiffs in this action.

AMOS HADLEY. [Seal.]

“SALLIE HADLEY. [Seal.]

“Approved by me this 25th day of August, 1880.

“JAMES M. EMMONS, Sheriff.”

The appellants insist that the foregoing facts, which embrace the substance of the evidence, do not sustain the finding and judgment of the court; that the action of replevin can not be sustained against a sheriff not in the actual possession of the property sought to be recovered. If in this the appellants are right, the judgment should be reversed, for it is agreed that they were not, at the time of the commencement of the suit, in the actual possession of the property, but that the property was in the actual possession of Amos and Sallie Hadley.

The code provides that “When any personal goods are wrongfully taken or unlawfully detained from the owner or person claiming the possession thereof, or when taken on execution or attachment, are claimed by any other person than the defendant, the owner or claimant may bring an action for the possession thereof.” 2 R. S. 1876, p. 88, sec. 128.

The goods in this case were claimed by the appellee. The levy made by the sheriff, though the goods were not removed by him, was a taking of them on execution within the meaning of the law. The goods were present and within the control of the officer at the time the levy was made. The sheriff did not remove the goods, did not take or have the manual possession of them, but upon the execution of a bond by the judgment debtor and his wife, by which they agreed to re-deliver the goods to him upon demand, in as good condition as they then were, he permitted the obligors to retain possession of them. Through this arrangement, though the bond was

Hadley *et al.* v. Hadley.

void as to Sallie Hadley, the sheriff still had the goods within his power and control. The surety on the bond being a married woman, and, therefore, not bound, the debtor, Amos Hadley, must be regarded as a mere receiptor of the goods, entrusted by the officer with their safe-keeping. As such, he was the agent or bailee of the officer, and his possession should be held to be the possession of the sheriff. To complete the levy, it was not necessary that the officer should have the manual control of the property, or touch it; if the property is present, as it was in this case, it is enough that the sheriff claims to exercise control over it by virtue of the execution, or that he makes an inventory of it, or threatens to remove it, unless a receiptor is given. *Connah v. Hale*, 23 Wend. 462. In the case of *Dillenback v. Jerome*, 7 Cowen, 294, it was held that the possession of the receiptor was to be regarded as the possession of the officer. *Burrall v. Acker*, 23 Wend. 606; *Hankins v. Kingsland*, 2 Hall (N. Y.) 425; *Crocker Sheriffs*, sec. 443. Where the sheriff has delivered goods taken by him on execution to a receiptor, he has the right at any time to resume the possession of the goods for the purpose of delivering them to the execution defendant, upon payment of the debt, and it is his duty to do this. So, too, he might and should, in this case, have demanded and obtained the possession of the goods from his receiptor, Amos Hadley, and delivered them to the officer having the writ of replevin. If the sheriff wrongfully took, as the evidence shows he did, the goods of the appellee on an execution against Amos Hadley, he could not, by entrusting the judgment debtor and his wife with the possession of the goods for him, avoid responsibility. We think the appellants had such possession of the property in controversy as rendered them responsible for it to appellee, and that the evidence sustains the judgment below. The judgment should be affirmed.

PER CURIAM.—It is ordered that, upon the foregoing opinion, the judgment below be affirmed, at the costs of the appellants.

Stringer v. The Northwestern Mutual Life Insurance Company.

No. 8638.

STRINGER v. THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

82	100
136	87
83	100
144	74

SUPREME COURT.—*Practice.*—*Evidence.*—Where the proof of a fact is clear and convincing, and yet the trial court has found the contrary without any evidence fairly tending that way, the finding, though against the party who had the burden of proof, will be set aside by the Supreme Court, especially when the witnesses were numerous, their testimony harmonious, and no attempt was made to impeach them, or to refute their statements by opposing evidence.

MARRIED WOMAN.—*Infant.*—*Disaffirmance of Deed Executed During Coverture and Minority.*—*Action to Quiet Title.*—*Complaint.*—*Estoppel.*—It is a question of fact whether the disaffirmance of a deed made by an infant *feme covert* was unreasonably delayed after she had reached her majority; and in an action by her to recover real estate so conveyed, a cross complaint by the defendant, to quiet the title thereto on account of such delay, should, besides alleging the lapse of time and circumstances, aver that the delay had been unreasonable.

Quære.—Whether an infant *feme covert*, who has conveyed her real estate, must disaffirm on arriving at full age, or may she do so within a reasonable time after becoming discover? and can she while under coverture be bound by an estoppel *in pais* against disaffirming her deed made when she was an infant and under coverture? *Seranton v. Stewart*, 52 Ind. 68, and *Miles v. Lingerman*, 24 Ind. 385, criticised.

ESTOPPEL IN PAIS.—As a rule there can not be an estoppel *in pais* unless there has been a change in the position of the parties in respect to the matter in dispute, to the detriment of the one who pleads the estoppel.

From the Hendricks Circuit Court.

E. G. Hogate, R. B. Blake and M. Sowder, for appellant.
C. Baker, O. B. Hord, A. W. Hendricks, C. Foley, A. Baker and E. Daniels, for appellee.

WOODS, J.—The appellant brought the action to recover of the appellee the possession of the undivided one-fourth of certain lands described in the complaint. The appellee answered by the general denial and filed a cross complaint, claiming title under a deed executed by the appellant when she was an infant *feme covert*, and alleging certain facts under which it was and is claimed that the appellant was estopped to disaffirm her deed.

Stringer v. The Northwestern Mutual Life Insurance Company.

The appellant demurred to the cross complaint, and has assigned error upon the overruling of that demurrer, and upon the overruling of her motion for a new trial.

The court upon request of the appellant found the facts specially, finding, among other things, that the appellant was not an infant, but was twenty-one years of age when she joined her husband in a conveyance of the land to one Josiah D. Wynn, who mortgaged the same to the appellee, and that by a foreclosure of that mortgage the appellee had become the owner of Wynn's title.

If this finding in reference to the age of the appellant when she joined in that conveyance can stand, the other questions in the case are immaterial. We are of opinion, however, that the finding in this respect is not supported by and is clearly contrary to the evidence.

The deed in question was made January 26th, 1866.

Lucinda Francis testified that her first husband, the plaintiff's father, died August 17th, 1849, the plaintiff being at the time "eight months and a few days old;" that she was present at the making of the deed, and before it was made told Mr. Wynn that none of the children were of age; that she contracted for tombstone for her husband four weeks after his death; the date on the tombstone is correct. Mrs. Nancy Stewart, an aunt of the plaintiff, testified that when William Stewart died the plaintiff was about eight months old. Levi Pennington testified that the plaintiff was an infant, he thought not more than eight or nine months old, when her father died in August, 1849; that he "looked at the tombstone this morning and the inscription there says that he died August 17th, 1849." The plaintiff testified that she did not know of her age except what she had heard; that her husband, brother and mother were present when the deed was made. Lorenzo D. Stringer, husband of the plaintiff, testified: "I told Wynn that I did not think she could make a good deed; I told him this when she signed the deed; my wife was fourteen years old January 2d, 1862, and was married October 1st, 1862."

Stringer v. The Northwestern Mutual Life Insurance Company.

William P. Stewart testified: "I am brother of plaintiff; I heard mother say to Wynn the day the deed was made, that none of us were of age; my sister, the plaintiff, is younger than I am; seventeen months younger."

On cross-examination, Mrs. Francis, the plaintiff's mother, identified the family record, which the parties agreed showed that John W. Stewart was born February 14th, 1845, William P., May 19th, 1846, and the plaintiff, January 2d, 1847, and on cross-examination, Mrs. Francis testified: "The family record was sent for by Mr. Foley, one of the attorneys for the defendant in this case. The record was made by L. D. Stringer five or six years ago with the assistance of my present husband; I procured the following letter to be written to Mr. Foley, which accompanied the record when I sent it to him, to wit:

"Wednesday, 28th, '79. Mr. Foley: The ages of these two heirs are as follows: Wm. P. Stewart was born May 19th, 1846; Mary E. Stewart was born January 2d, 1847. The above is a correct statement of these heirs' ages, took from the family record. Please answer immediately.

"LUCINDA FRANCIS."

Josiah D. Wynn, called by the defendant, testified: "At the time the deed was made, there was a complaint that William P. Stewart was not of age, and after the deed was made, and before it was recorded, he and I went to Mr. Foley for counsel about it; he told us to wait until William should be twenty-one years of age, and for him then to acknowledge it a second time; and, accordingly, May 21st, 1866, William and his wife acknowledged the deed a second time before the same officer, as it was before, and it was afterwards recorded; * * four or five years ago, after I went into bankruptcy, Stringer, the husband of the plaintiff, told me that if the land had remained in my hands, he would not have brought suit to claim the land, and this was the first time that I ever heard that Mrs. Stringer claimed to have been under twenty-one years of age at the time she executed the deed to me with the others."

Stringer v. The Northwestern Mutual Life Insurance Company.

The defendants also introduced in evidence the sworn application of Mrs. Stewart (Francis), for the appointment of a guardian of her children, dated March, 1856, wherein she represented them to be aged respectively as follows: John W., twelve years, William P., ten years, and Mary E., the plaintiff, eight years; also the reports of S. T. Hadley, the guardian of said minors, including the final report, dated January 30th, 1866, in which is found the statement following, to wit: "And the said wards having arrived at lawful age, now pays to said guardian the balance above mentioned, and said guardian asks to be discharged," etc.

While there are some discrepancies in the evidence, especially between the statements of some of the witnesses and the so-called family record, there is nothing to obscure, or to cast any reasonable doubt on the proposition that the plaintiff was a minor when she made the deed which she seeks to set aside. The family record is inconsistent with the known and usual course of nature, and is evidently not to be relied on, if, indeed, it was admissible for any other than impeaching purposes against those who aided in making it. If it constituted evidence of the plaintiff's age, it showed her to be a minor at the date of the deed, though more nearly of age than the testimony of the witnesses showed her to be.

Excepting the final report of the guardian, made four days after the execution of the deed, there is no evidence which, it is claimed, even tends to show that the plaintiff was of age when she made the deed, and that evidence, as we think, is easily harmonized with that which satisfactorily establishes the opposite conclusion.

The marriage of a female ward to a person of full age operates as a discharge of the guardianship; that the plaintiff had been married as much as four years there is no conflict in the evidence, and so it was not requisite that she should be twenty-one years old before her guardian could be discharged. The statement in the report, therefore, that his wards were of lawful age on the 30th, was not proof that

Stringer v. The Northwestern Mutual Life Insurance Company.

they were of age four days earlier, and, in the light of the other evidence, can not be said to tend to prove that the plaintiff was twenty-one years old at that time. Certainly, it ought not to weigh down or even to impair the force of the contrary evidence, which is clear and satisfactory.

It can not be doubted that the plaintiff's father died in August, 1849. The undisputed inscription on his tombstone, made very soon after his death, puts that beyond reasonable cavil; and the sworn statement of the mother, in 1856, when there was no possible motive for misrepresentation, that the plaintiff was eight years old, leaves no room for questioning the accuracy and truthfulness of the testimony, that she was but eight or nine months old when her father died. But if this left room for hesitation, there remains the fact that her next older brother was conceded to be under age at the time the deed was made, and, in order to confirm his act, made a subsequent acknowledgment of his execution of the conveyance.

It is true that the plaintiff had the burden of proof to show her infancy when the deed was made, and it was the province of the court to weigh the evidence and determine the credibility of the witnesses; and it is the well settled rule of this court not to disturb the finding of the court or jury upon a question of fact concerning which the evidence was conflicting, and where there was evidence fairly tending to support the verdict.

The fact remains, however, that human testimony is the ultimate means of proof on which verdicts must rest. Without it circumstantial evidence can not be adduced, and, if disputed, the genuineness and authenticity of documentary proof must be established by it.

When, therefore, there is clear and convincing proof of a fact, and yet the court has found the contrary, without any evidence fairly tending that way, though against the party having the burden of proof, the finding ought not to stand, especially when, as in this case, the witnesses were numerous, their testimony in all essential respects harmonious, and no

Stringer v. The Northwestern Mutual Life Insurance Company.

attempt made to impeach their character, or to refute their statements by opposing evidence.

The substance of the cross complaint is, that on and prior to the 26th day of January, 1866, the plaintiff, being an infant under twenty-one years of age, and being the owner of the undivided one-fourth of the lands described in the complaint, joined her husband in a conveyance of the same to Josiah D. Wynn, which deed was duly recorded and for which she received of said Wynn an adequate consideration; that her only claim to said land is based on the fact that she was an infant at the time she executed and acknowledged said deed, and that on the 10th day of April, 1879, before commencing this suit, she notified the defendant in writing of her disaffirmance of said deed; that she attained the age of twenty-one years on the 2d day of January, 1868, more than eleven years prior to the service on the defendant of notice of said disaffirmance; that immediately after the execution of said deed to him, said Wynn entered into the actual, exclusive and visible public and adverse possession of the land as owner under said deed and so continued until his title was transferred to and vested in the defendant, and, while so in possession, had the same enclosed and cultivated it as part of his farm, and made lasting and valuable improvements thereon of the value of _____ dollars, the plaintiff and her husband residing the meantime not more than five miles distant, and knowing of Wynn's possessing, cultivating and paying the taxes on said land and claiming to be the owner thereof; that on the 27th day of July, 1872, Wynn executed to the defendant a mortgage on said land with other lands, to secure the repayment of \$3,000 loaned him by the defendant; the defendant relying upon the recorded title, and the validity of the said deed, without notice or suspicion of any infirmity therein; that it caused said mortgage to be duly recorded on the 12th day of August, 1872, and afterwards by due foreclosure and sale under the decree, to wit, on the 12th day of February, 1878, the defendant became the owner of said land; that the

Stringer v. The Northwestern Mutual Life Insurance Company.

plaintiff and her husband well knew that Wynn had mortgaged the land to the insurance company, and that the company was proceeding to foreclose said mortgage, but gave no notice of her minority at the time the deed was made, nor of her intention to disaffirm, until after the sale and conveyance under the decree to the defendant, but during all said time studiously concealed by silence from the defendant the fact of her minority; that after the execution of said mortgage, Wynn on his own petition was adjudged a bankrupt, and by decree of the court was discharged in bankruptcy before said foreclosure, of which the plaintiff and husband had notice and of the reliance of the insurance company on said mortgage security, and that by reason thereof it failed to prove the debt against the bankrupt's estate. Wherefore the said insurance company claims:

First. That it is a *bona fide* purchaser without notice of the plaintiff's minority.

Second. That her right to disaffirmance was lost by lapse of time.

Third. That under the facts alleged she is estopped to disaffirm.

We are of opinion that the court erred in overruling the demurrer for want of facts to this pleading.

Even if it be conceded that a married woman may be bound by an estoppel *in pais* against disaffirming her deed made while an infant *feme covert*, upon which point *Behler v. Weyburn*, 59 Ind. 143, and the cases following it, may be considered, no estoppel is shown in this instance, unless it shall be deemed to consist mainly in the mere lapse of time, and it is not alleged that the delay had been unreasonable. *Wiley v. Wilson*, 77 Ind. 596. Nothing else among the matters alleged can be regarded as of great significance.

The improvements alleged to have been made by Wynn are not described, nor shown to have been of any value, and the presumption may well be indulged that the products of the land afforded ample compensation for his outlay in taxes, im-

Stringer v. The Northwestern Mutual Life Insurance Company.

provements, and in cultivation ; and as to the insurance company, it is not pretended that anything was done to prevent, or turn aside, enquiry into the capacity of the appellant to join in the deed, on the faith of which the company claims to have acted, an enquiry which every purchaser, grantee or mortgagee is bound to make at his peril, and for a failure to make such enquiry, the registry laws afford no excuse or protection. See *McClain v. Davis*, 77 Ind. 419. Besides, it is not alleged that the appellant had any knowledge of the loan by the company to Wynn until after it was made, nor that the other lands covered by the mortgage did not make the security good, and it is not shown that the company lost anything by failing to prove its claim against Wynn's bankrupt estate, which, so far as appears, was worthless. The mortgage under which the appellee obtained title, was made in July, 1872, six and one-half years after the date of the deed in which the appellant joined, and nothing is averred to show that the failure of the appellant from that time to disaffirm her deed did work, or could have worked, to the injury of the appellee. There is no reason in principle for saying that the right to disaffirm a deed on account of infancy shall be cut off by lapse of time short of the period prescribed in the statute of limitations, for bringing an action to recover the property, unless it be on the principles of estoppel, and it must be an exception to the ordinary rule if there can be an estoppel where there has been no change in the position of the parties in respect to the matter in dispute, detrimental to the one who pleads the estoppel. If, then, this reasoning be correct, the estoppel must be found, not in the lapse of time from 1866 to 1879, when the disaffirmance was declared, but from 1866 to 1872, when the mortgage was made, as after that time nothing is shown to have occurred to the further detriment of the appellee. To say the least, according to the rule declared in *Wiley v. Wilson*, *supra*, it should have been alleged that the disaffirmance had been unreasonably delayed, so that the question of fact could have been left to the jury.

Stringer v. The Northwestern Mutual Life Insurance Company.

For the proposition that an infant *feme covert* must disaffirm her deed within a reasonable time after arriving at majority, though yet under *coverture*, counsel seem to rely mainly upon *Scranton v. Stewart*, 52 Ind. 68 and *Miles v. Lingerman*, 24 Ind. 385. Those cases came recently under a careful and critical examination by the Supreme Court of the United States, in the case of *Sims v. Everhardt*, 102 U. S. 300, wherein it was held, in reference to a conveyance in this State in 1847, that a disaffirmance was good, if made within a reasonable time after the ceasing of the *coverture*. Some stress is laid, in the opinion, upon the fact that the case of *Scranton v. Stewart* arose upon a deed made after the laws of 1852 had taken effect, whereby the married woman was empowered to bring suits concerning her lands, independently of the husband; but, as under those laws she was still entitled to the benefit of the disability of *coverture* and was not bound to sue, it would seem that no additional duty should be, on that account, imposed on her in reference to the act of disaffirmance, which must, in such case, precede the bringing of the suit. If the express giving of power to sue does not, in respect to the statute of limitations, impose the duty to sue, much less, apparently, can there be inferred, from the grant of that power, a new rule in reference to the act of disaffirmance, in respect to which the laws referred to are entirely silent. This is a point, however, which need not be decided now, and which we prefer to leave open for further consideration. For the other reasons stated, the counter-claim is insufficient, and the demurrer to it should have been sustained.

Judgment reversed, with costs, and cause remanded, with instructions to grant a new trial and to sustain the demurrer to the counter-claim.

Ayers v. Adams.

No. 8792.

82 100
144 607

AYERS v. ADAMS.

MORTGAGE.—Subrogation.—Estoppel.—Vendor and Purchaser.—Payment and Entry of Satisfaction.—A person who purchases real estate which is subject to a mortgage and a judgment lien, and who pays the mortgagee the prior lien and causes an entry of satisfaction to be entered of record without any knowledge of the judgment, is entitled to be subrogated to the rights of the mortgagee as against the judgment creditor and is not estopped to assert such right against such creditor who purchases the property at execution sale upon the judgment after the entry of satisfaction.

SAME.—Preferred Creditor.—Fraudulent Conveyance.—A mortgage, made by an insolvent debtor to secure a valid claim, is not invalid because it was executed while a suit was pending by another creditor against the mortgagor for the collection of a debt, and because it was made to give the mortgagee a preference over such other creditor.

SAME.—Consideration.—Where a mortgage is executed to secure pre-existing notes, no consideration other than the notes is necessary to support the mortgage.

SPECIAL FINDING.—Presumption.—Burden of Issue.—Where the special finding of the court is silent upon any question of fact, such fact is regarded as found against the party upon whom the burden of the issue rests.

From the Hendricks Circuit Court.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellant.
L. M. Campbell, for appellee.

BEST, C.—The appellant brought this suit, alleging in his complaint substantially that one James Ayers owned an undivided interest in a certain parcel of land in Hendricks county, Indiana; that, on the 24th day of February, 1877, and while he owned the land, he executed a mortgage upon it to the administrator of his father's estate, to secure two notes of \$100 each, made by him to said decedent, which mortgage was duly recorded on February 27th, 1877; that, on the 25th of March thereafter, the appellee recovered a judgment for \$200 against said James Ayers, which became a lien upon said land junior to the lien of said mortgage, and afterward, to wit, on the 28th of December, 1877, the appellant, without

Ayers v. Adams.

any knowledge of said judgment, purchased said land of said James Ayers, who conveyed the same to him by warranty deed; that, as a part of the purchase price of said land, appellant agreed to pay said mortgage, and, in pursuance of said contract and to protect his title, he did, in January, 1878, pay \$318.85, in full satisfaction of the same, to said administrator, who entered the same satisfied of record; that afterward, to wit, on the 4th day of May, 1878, the appellee caused said land to be sold at sheriff's sale to satisfy said judgment, and became himself the purchaser with full notice that appellant claimed an equitable lien upon said land for the amount he had paid in extinguishment of said mortgage; that the appellee, by virtue of his purchase, is claiming a paramount lien as against appellant. Wherefore he asks that he may be subrogated to the rights of the mortgagee, and that his lien be declared prior to that of the appellee.

An answer of three paragraphs was filed. The first was a general denial. The second averred that, before the appellee caused an execution to issue upon his judgment, the appellant had caused satisfaction of the mortgage mentioned in the complaint to be entered of record, with full knowledge of the appellee's judgment; that, thereafter, the appellee, "at great trouble, cost and expense to himself," caused the land to be sold in satisfaction of his judgment, and became himself the purchaser, by reason of which the appellant is estopped. The third averred that James Ayers was not indebted to the decedent William Ayers, and that the mortgage to the administrator and the deed to the appellant were made and accepted for the purpose of defrauding the appellee out of his claim.

A demurrer for the want of facts was overruled to the second paragraph of the answer, after which a reply of denial was filed. The issues were tried by the court and a finding made for the appellee. At his request, the court found the facts specially, and stated its conclusions of law thereon.

The appellant excepted to the conclusions of law, moved

Ayers v. Adams.

for a new trial, which was overruled, and final judgment was rendered for the appellee.

The appellant has assigned the following errors :

“ 1st. That the court erred in overruling the demurrer to the second paragraph of the answer ;

“ 2d. That it erred in its conclusions of law upon the facts found ; and,

“ 3d. That it erred in overruling the motion for a new trial.”

These assignments will be considered in the order of their statement.

The second paragraph of the answer was clearly bad, as the facts averred did not estop the appellant from insisting that the mortgage should be treated as an existing lien, prior in point of time to the appellee's judgment. The mere entry of satisfaction was not an assurance that the appellant was not entitled to be subrogated to the rights of the mortgagee, nor was it an invitation to the appellee to invest his money in the property, which was done, for aught that is averred, with full knowledge of all the facts. The paragraph was bad, and the demurrer was improperly overruled.

The second assignment questions the correctness of the court's conclusions of law upon the facts found. To determine this question, it is not necessary to set out the finding of facts. The appellant averred, and it was necessary for him to prove in order to recover, that he had paid the mortgage. The finding is silent upon this question of fact. The finding being silent upon this question, it is regarded as found against the appellant, as has often been decided by this court. *Graham v. State, ex rel.*, 66 Ind. 386 ; *Parker v. Hubble*, 75 Ind. 580. In the absence of an affirmative finding of this fact in favor of the appellant, he was not entitled to judgment, and hence there was no error in the conclusions of law upon the facts found.

The motion for a new trial questions the sufficiency of the evidence to support the finding.

Ayers v. Adams.

The burthen of the issue formed by the complaint and the general denial was upon the appellant. The undisputed facts, as established by the evidence, made for him a *prima facie* case. The facts are, that William Ayers died on the 15th of January, 1877, leaving a wife and seven children surviving him, to whom eighty odd acres of land descended. The appellant was one, and James, the execution debtor, was another. Immediately after the death of William Ayers, the appellee commenced a suit against James, upon the claim he held against him, and pending this suit James Ayers, at the instance of the administrator of the estate of William Ayers, deceased, executed a mortgage upon the interest in the land so inherited from his father, to secure the payment of two notes made by him to his father four or five years before, for borrowed money. This mortgage was at once recorded, and afterwards, to wit, on the 20th of March, 1877, the appellee recovered judgment against James, in the Hendricks Circuit Court, for \$200. In December, 1877, James Ayers conveyed the land to the appellant, who agreed, in consideration of such conveyance, to pay the mortgage then held by the administrator, which then amounted to \$318.85; and afterwards the appellant did pay the mortgage, by executing a receipt to the administrator for such portion of the sum secured by it as he was entitled to upon distribution, and by obtaining from his mother, his brothers and sisters like receipts for their respective shares upon distribution, which vouchers the administrator accepted in payment of the mortgage, and entered it satisfied of record. Afterwards the appellee caused an execution to issue upon his judgment, and the land was sold to satisfy it, he, himself, becoming the purchaser. These facts entitled the appellant to the relief sought. The point is made, that the evidence does not satisfactorily show that the appellant paid his mother, brothers and sisters anything for the vouchers obtained from them. It was not necessary that it should. They were entitled to the fund secured by the mortgage upon distribution. The gift of their respective interests transferred the same rights as a pur-

Ayers v. Adams.

chase and a payment. In either case, the appellant became the beneficiary of the fund, and the production and acceptance of the vouchers operated as a payment of the mortgage precisely as though the money had been paid and refunded to him upon the vouchers. The appellant was himself entitled to a part of the fund upon distribution, and as to that part there can be no question that his voucher operated as a payment *pro tanto*. James also executed his voucher for his share, for which the appellant paid him nothing at the time; but the appellant testified that James owed him the amount of his voucher, and this was not disputed. If, under the circumstances, it would be inequitable to allow the appellant the amount of James' voucher, this fact would not destroy the entire payment made, but would only diminish the amount paid.

The burthen of the issue formed by the third paragraph of the answer and the reply in denial was upon the appellee, and was not proved. There was no pretence that the notes of the decedent were not valid and binding obligations, nor that the mortgage was not taken to secure the notes. It is true that it was not taken until after the institution of the appellee's suit, but this fact did not preclude the debtor from executing, or the administrator from accepting, the mortgage. A debtor may prefer one creditor to another, and he may do this by mortgage while a suit is pending by the other. The validity of a mortgage is not impaired by the fact that the debtor intended to give the mortgagee a priority over other creditors. This he has a legal right to do, and the creditor is authorized to accept the preference. Bump Fraud. Conveyances, page 186.

This was all that was done. No consideration, such as the extension of time, was given for the mortgage, and the finding seems to proceed upon the assumption that some consideration other than the notes was necessary to uphold the mortgage. This was a mistake. No other consideration was necessary.

The appellee says that "this is one of the cases where the record makes a very poor showing of what the real facts were,"

but, of course, we can only determine these questions from the record before us.

For these reasons, we think the motion for a new trial was also improperly overruled, and that the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby reversed in all things, at the appellee's costs, with instructions to grant a new trial, and sustain the demurrer to the second paragraph of the answer.

No. 9148.

VANCE ET AL. v. SCHROYER ET AL.

82 114
135 137

82 114
165 287

REAL ESTATE, ACTION TO RECOVER.—*Complaint.*—*Title.*—*Right to Possession.*

—It is not necessary, in an action for the recovery of real estate, for the plaintiff to aver in his complaint that he is the owner in fee of the land; any one having a subsisting interest therein and a right to the possession thereof may maintain an action against the tenant in possession. And where, in such action, the complaint avers that a court of competent jurisdiction, in a suit in which the plaintiff and defendant were parties, adjudged the plaintiff to be the owner and entitled to the possession of the premises, and that the defendant unjustly withheld from him the possession thereof; that, in pursuance of a writ of restitution issued on such judgment, the plaintiff was put in possession of the premises; but that afterwards the defendant forcibly and without right entered and took possession thereof, it shows that the plaintiff had a subsisting interest in the real estate and was entitled to the possession, and is sufficient on demurrer.

PLEADING.—*Practice.*—An argumentative pleading will not be held bad on demurrer. The remedy is by motion to make more specific.

From the Boone Circuit Court.

C. C. Nave, for appellants.

J. W. Clements, for appellees.

MORRIS, C.—This suit was brought by the appellees against

Vance et al. v. Schroyer et al.

the appellants, to recover the possession of forty acres of land, situated in Boone county, alleged to be in the possession of the appellants without right.

The complaint states, that the appellees Daniel M. Schroyer and Elizabeth Schroyer, his wife, and John T. Alexander and Julia A., his wife, at the September term, 1879, of the Boone Circuit Court, obtained a judgment against the appellants David M. Vance, George W. Vance, Sophronia Vance, Icelina Vance and Spencer Vance, and one Ezra Smith, for \$87.50 damages, and costs taxed at \$40.75, and adjudged the appellees to be the owners and entitled to the possession of the following real estate, in Boone county, Indiana, to wit: The northwest quarter of the southwest quarter of section two, township seventeen north, of range one east, and that the appellants unjustly withheld possession of the same from the appellees; that on the 6th day of October, 1879, the clerk of said court issued a writ of restitution and execution on said judgment, directed to the sheriff of said county, and commanding him to levy said damages and costs of the property of the said David M. Vance and George W. Vance, and to take possession of and deliver up to the appellees said premises; that said writ was duly placed in the hands of the sheriff of said county, who, by virtue thereof, on the 16th day of October, 1879, executed said writ of restitution by ejecting the appellants from said premises, and by delivering possession of the same to the appellees; that afterwards, on the 25th day of October, 1879, the appellants, without right, title or authority from the appellees, unlawfully and forcibly entered into and took possession of said premises, and are now in possession of the same without right, and ever since said 25th day of October, 1879, have unlawfully and without right had and held possession of the same, to the damage of the appellees in the sum of \$50. It is averred that the appellees are the owners of five-sixths of said premises, and were the owners of the same prior to the rendition of said judgment. Possession of said premises is demanded, and damages for their detention.

Vance et al. v. Schroyer et al.

The appellants demurred to the complaint. The demurrer was overruled. They then answered the complaint by a general denial.

The cause was submitted to the court for trial. There was a finding and judgment for the appellees. The appellants asked and obtained a new trial as of right, under section 601 of the code. The appellants then took a change of venue from the judge who tried the cause, and Thomas J. Cason, a competent attorney, was appointed to preside on the second trial.

The cause was again submitted to the court for trial, which resulted in a finding and judgment for the appellees.

The appellants assign as error the overruling of the demurrer to the complaint.

The appellants insist that the complaint is bad, if the action is to be regarded as a suit for the recovery of real property under article 23 of the code, for the reason that it is not averred that the appellees are the owners in fee of the real estate sued for, and entitled to the possession of the same.

It is not necessary that it should be averred in the complaint that the party seeking to recover is the owner in fee of the land in controversy. Any one having a subsisting interest in real estate, and a right to the possession thereof, may recover the same by an action, to be brought against the tenant in possession. It is true that the complaint does not in this case directly aver that the appellees are the owners in fee of the premises sought to be recovered, nor that they have a right to the possession thereof, but it is averred that a court of competent jurisdiction, in a suit in which they were plaintiffs, and the appellants and one Smith were defendants, on the — day of September, 1879, adjudged them to be the owners of said premises, and entitled to the possession thereof, and that the appellants unjustly withheld from them the possession of the same; that in pursuance of the commands of a writ of restitution, duly issued on said judgment, the sheriff of Boone county, on the 16th day of October, 1879, ejected the appel-

Coolman *et al.* v. Fleming *et al.*

lants from said premises, and delivered the same to the appellees; that nine days afterwards, on the 25th of October, 1879, the appellants forcibly and without right, and without authority from the appellees, entered into and took possession of said premises, and have ever since held the same without right.

From these averments the inference is irresistible that the appellees had a subsisting interest in the real estate in dispute, and were entitled to the possession of the same. The judgment of the court was conclusive between the parties until reversed or set aside. It may be said, as was said in the case of *Bell v. Eaton*, 28 Ind. 468, that if the ownership and right of possession of the appellees are alleged argumentatively, "we must regard the argument as so conclusive as to amount to an express allegation of the facts, when tested by a demurrer." An argumentative pleading will not be held bad on demurrer. *French v. Howard*, 14 Ind. 455; *Garrison v. Clark*, 11 Ind. 369; *Austin v. Swank*, 9 Ind. 109. The defect can be reached only by motion to make the pleading more certain.

We think the complaint was sufficient, and that the judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

No. 7589.

COOLMAN ET AL. v. FLEMING ET AL.

DRAINAGE.—Board of Commissioners.—Amendment.—Practice.—Under the act of March 9th, 1875, Acts 1875, p. 97, concerning drainage, the petition could be amended by leave of the board, even as to a jurisdictional fact; and, on appeal, a like amendment could be made by leave of the circuit court. It follows that after such amendment by leave of the circuit court, on appeal, it would be error to dismiss the appeal for a defect so removed by the amendment.

89	117
124	21
82	117
143	247
82	117
148	149
82	117
155	658
82	117
163	484

Coolman *et al.* v. Fleming *et al.*

SAME.—Petition.—Public Utility.—Under such act, a general statement in the petition, that the drain proposed would be of public utility, was sufficient without alleging also that it would benefit the public health.

SAME.—Description.—Under such act, a petition was sufficiently definite as to the *termini* and course of the work proposed, which described it as beginning on the line between H. and W. counties, about 80 rods north of the northeast corner of sec. 36, t. 26 n., r. 10 east, and running thence in a westerly direction about 80 rods, thence in a southerly direction about 22 rods, thence in a westerly direction about 80 rods, thence in a southerly direction about 28 rods, thence in a westerly direction about 48 rods, thence in a southerly direction about 121 rods, thence in a westerly direction about 38 rods until it intersects another ditch named, on the west half of the n. w. quarter of sec. 36, same town and range, about 60 rods east of the west line, and about 80 rods south of the north line thereof.

SAME.—Notice.—Waiver.—Parties who appeared before the county board in proceedings under such act, and made no objection to the notice, could not make such objection for the first time in the circuit court on appeal.

From the Huntington Circuit Court.

W. H. Trammel, for appellants.

J. B. Kenner and *J. I. Dille*, for appellees.

NEWCOMB, C.—The appellants presented their petition to the board of commissioners of Huntington county, praying for the construction of a ditch through the lands of the petitioners and divers other parties named in the petition. The proceedings were had since the act of March 9th, 1875.

Viewers were appointed, and, after the filing of their report, the auditor gave notice by publication of the pendency of the petition, as directed by the second section of the act. At a subsequent term, the appellees appeared and filed a verified motion to dismiss the proceedings, on the ground that a ditch already existed substantially on the line proposed, for the construction of which they had been assessed, and which, with a small expenditure for repairs, would be sufficient to carry off the water and drain all the lands interested; and that the proposed ditch would not be conducive to public health, convenience or welfare, and not of public utility. The motion was overruled. A remonstrance was then filed, and the ap-

Coolman et al. v. Fleming et al.

pellees Fleming and Stinson interposed separate claims for damages.

The remonstrants having given bond as required by the statute, reviewers were appointed. Their first report was rejected, but, having been amended, it was refiled and acted upon by the board of commissioners. No damages were awarded to the remonstrants claiming them. The report was accompanied by a carefully tabulated statement of the length of each section of the proposed ditch, and embracing all the particulars required by sections 2 and 11 of the act of 1875. It was also accompanied by a map showing the *termini* and exact course and distance of the proposed ditch, with the names of the owners of each tract of land, and the quantity of each tract affected by the ditch.

A motion to reject the report was overruled. The case was then submitted and the board entered a finding that the proposed work was necessary, conducive to public health and of public utility, and ordered the ditch to be established and constructed in conformity with the report of the reviewers.

The remonstrants appealed to the circuit court, and then moved to dismiss the case for the following reasons:

"1st. There is no law authorizing said proceeding.

"2d. The petition filed in said proceeding is insufficient and defective in this: That it does not show that the proposed ditch or drain will be conducive to the public health, convenience or welfare, or of public benefit or utility.

"3d. The petition filed in said proceeding is insufficient and defective in this: That it does not show the starting point, route or terminus of the proposed ditch or drain.

"4th. No legal notice was given of the pendency of said petition, and the time set for hearing thereof.

"5th. The notice given of the pendency of said petition, and of the time set for the hearing thereof, was insufficient and illegal in this: That it did not contain a pertinent description of the terminus of the proposed work, and its direction and course, from its source to its outlet.

Coolman et al. v. Fleming et al.

"6th. Because the report of the reviewers is insufficient and illegal in this: That it does not sufficiently locate or describe the proposed work."

The petitioners then asked leave to amend the petition, which leave was granted over the objection and exception of the remonstrants, and the petition was amended by inserting averments that the proposed ditch would be "conducive to health and of public utility."

The motion to dismiss was then renewed, and was sustained on the grounds set forth in the 4th and 5th causes assigned. The case was then ordered dismissed, and judgment for costs was rendered against the petitioners, to all of which they excepted.

The appellants assign for error the dismissal of the proceedings, and the appellees assign a cross error on the ruling permitting the amendment of the petition.

We will first consider the cross assignment of error.

The jurisdiction and powers of the county commissioners in such cases are thus defined by the act of 1875, 1 R. S. 1876, pp. 428-9:

"Section 1. * The board of commissioners of any county shall have power, at any regular or called session, when the same shall be conducive to the public health; convenience or welfare, or when the same will be of public benefit or utility, to cause to be constructed, as hereinafter provided, any ditch, drain, or watercourse within said county.

"Sec. 2. * Before the board of commissioners shall establish any ditch, drain or watercourse, there shall be filed, with the auditor of such county, a petition signed by one or more of the land-owners whose lands will be liable to be affected by, or assessed for the expense of the construction of the same, setting forth the necessity thereof, with a general description of the proposed starting point, route and terminus, and shall file a bond," etc.

The residue of this section provides for the appointment and defines the duties of viewers, and directs notice to be

Coolman *et al.* v. Fleming *et al.*

given by the auditor of the pendency of the petition, after the filing of the report of the viewers.

Section 4 is as follows: "Said board of commissioners, at the time set for the hearing of said petition, shall, if they find the provisions of the second section of this act to have been complied with, proceed to hear said petition, and if they find such proposed work to be necessary and conducive to public health, convenience or welfare, or of public benefit or utility, they shall establish the same as specified by the report of the viewers."

The argument of the appellees is that the petition was defective in not stating any facts showing a necessity for the construction of the proposed ditch; therefore, the commissioners did not acquire jurisdiction in the case, and if the proceedings of the commissioners were *coram non judice*, the circuit court was also without jurisdiction, and had consequently no authority to allow an amendment of the petition, or to take any other step than to dismiss the proceedings.

The petition was unquestionably defective in the particular stated. *McKinsey v. Bowman*, 58 Ind. 88; *Tillman v. Kircher*, 64 Ind. 104; *Bate v. Sheets*, 64 Ind. 209; *Chambers v. Kyle*, 67 Ind. 206; *Deisner v. Simpson*, 72 Ind. 435.

Does it follow that the board of commissioners acquired no jurisdiction, for any purpose, by reason of this defect? Had not jurisdiction so far attached at least that it was competent for the commissioners' court, while the proceedings were *in fieri*, to allow an amendment of the petition such as was made in the circuit court? The statute conferred on the commissioners jurisdiction over the subject-matter of draining lands. Sitting as a court, they had the same authority to allow amendments of pleadings in causes pending before them that belongs to circuit courts. 1 R. S. 1876, p. 351, section 9; *Hedrick v. Hedrick*, 55 Ind. 78.

Section 97 of the code of practice provides that "Any pleading may be amended by either party of course at any time before the pleading is answered. All other amendments

Coolman et al. v. Fleming et al.

shall be by leave of the court." A large discretion is, by this section, given to courts in the matter of permitting amendments of pleadings. If a jurisdictional fact is omitted in a complaint or petition, the omitted averment may be inserted by way of amendment, as well as any other averment necessary to perfect the pleading. A pertinent case on this subject is *Jackson v. Ashton*, 10 Peters, 480. Where an action is brought in a circuit court of the United States, the complaint or bill must, in ordinary cases, aver the citizenship of the parties, and show that they are citizens of different States. Without such averment, the court has no jurisdiction. In the case cited, a decree of a circuit court had been reversed because the jurisdictional fact of citizenship was not stated in the bill of complaint; but it was held that, after the cause was remanded to the circuit court, it might, in its discretion, permit an amendment showing that the parties were citizens of different States, and thus acquire jurisdiction.

Had the motion been made before the board of commissioners that was afterwards made in the circuit court, we entertain no doubt that the board might have ordered the amendment that was subsequently made in the latter court, whether the amendment is to be deemed a jurisdictional one or otherwise.

It was also competent for the circuit court to allow the amendment after the appeal. *Hedrick v. Hedrick*, 55 Ind. 78. By the terms of the statute authorizing the appeal, the same was required to be heard, tried and determined as an original cause. 1 R. S. 1876, p. 357, sections 36, 37. As an original cause in the circuit court, the petition was amendable by the general power of that court to permit amendments of pleadings, unless in an appeal where commissioners had assumed jurisdiction in a cause totally foreign to their powers, as, for example, where they had assumed jurisdiction to try the question of the title to real estate, or had rendered judgment on a promissory note.

The case at bar, however, is one where it is conceded that

Coolman *et al.* v. Fleming *et al.*

the commissioners had jurisdiction of the subject-matter, if the petition had been perfect in its averments touching the necessity for the improvement prayed for. It is the case of a defective petition that the court should order that done which it is admitted it had statutory power to order on a more perfect petition. *Muncey v. Joest*, 74 Ind. 409. In such case, the petition was amendable in either court. The circuit court, therefore, committed no error in allowing the amendment; but it erred in dismissing the cause, after the petition had been made sufficient by the amendment.

There has been some discussion in this case on the question whether the order of the board of commissioners was void in consequence of the imperfections of the petition. The view of the case we have taken renders an examination of that question unnecessary; but, as bearing on that point, we refer to *Weston v. Lumley*, 33 Ind. 486; *Snelson v. State*, 16 Ind. 29; *State v. Gachenheimer*, 30 Ind. 63; *The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 657; *United States v. Arredondo*, 6 Peters, 691; *Grignon's Lessee v. Astor*, 2 How. 319; *Board of Commissioners, etc., v. Hall*, 70 Ind. 469; *Miller v. Porter*, 71 Ind. 521; *Muncey v. Joest*, *supra*, and *Stoddard v. Johnson*, 75 Ind. 20.

The appellees insist that, after being amended, the petition was still insufficient; that the averments, that the ditch would be conducive to health and of public utility, were too general. Stating that the ditch would conduce to health, did not help the petition. It is the benefit of the *public* health that is made a ground for such a proceeding; but the averment that the work would be of public utility made the petition clearly sufficient as to the necessity for the construction of the ditch. *Corey v. Swagger*, 74 Ind. 211.

The sufficiency of the petition is further questioned on the ground that it is too indefinite in its description of the *termini* and course of the ditch. The route is described as "Commencing at a point on the line dividing the counties of Huntington and Wells, about 80 rods north of the northeast corner

Coolman *et al.* v. Fleming *et al.*

of section No. 36, in township No. 26 north, of range No. 10 east; running thence in a westerly direction about 80 rods; thence in a southerly direction about 22 rods; thence in a westerly direction about 80 rods; thence in a southerly direction about 28 rods; thence in a westerly direction about 48 rods; thence in a southerly direction about 121 rods; thence in a westerly direction about 38 rods, until the same intersects and connects with another proposed ditch petitioned for in this court by Samuel Morrison and others, at a point on the west half of the northwest quarter of section No. 36, town and range aforesaid, about 60 rods east of the west line, and about 80 rods south of the north line thereof."

In *Spahr v. Schofield*, 66 Ind. 168, a doubt was intimated as to the sufficiency of a somewhat more indefinite petition in a like case, but the point was not decided. In the later case of *Corey v. Swagger*, *supra*, a petition was held good when the *termini* and route of the proposed ditch were given in terms similar to the description in the case under consideration. In that case, ELLIOTT, J., in delivering the opinion of the court, said: "The second section of the act under which these proceedings were instituted requires a petition setting forth the necessity for the proposed ditch, 'with a *general* description of the proposed starting point, route and terminus.' 1 R. S. 1876, p. 428. The appellee's petition does give a '*general* description' of starting point, route and terminus. The use of the word 'about,' taken in connection with the words restraining and limiting its meaning, does not materially impair the certainty of the description. In the cases of *Scraper v. Pipes*, 59 Ind. 158; *DeLong v. Schimmel*, 58 Ind. 64, and *Farmer v. Pauley*, 50 Ind. 583, there were no words restricting the application of the indefinite terms 'about' and 'near.' Here, these terms are carefully restricted by giving the section, town and range, and by stating with reasonable accuracy the courses and distances."

We think that from the description of the starting point, route and terminus, given in the petition under review, the

viewers appointed could readily locate the proposed ditch, and any uncertainty in its precise course, as described in the petition, would be obviated by the report of the viewers, provided for in sections 2 and 11.

On the authority of *Corey v. Swagger*, we hold the petition sufficient in the matter of description.

It is further urged that the cause was properly dismissed, because the notice published by the county auditor did not contain the "pertinent description of the terminus of such proposed work, its direction and course from its source to its outlet," prescribed by section 2 of the act of 1875.

The description of the starting point, course, distances and terminus of the proposed ditch as given in the auditor's notice, was copied literally from the petition. Whether this was a "pertinent" description, or whether it should have been made more explicit from the data furnished by the report of the viewers, is a question that does not arise. The notice was the process provided by law for bringing the parties interested into court. They did appear, and submitted to a hearing on the merits, in the commissioners' court, without objecting to the form or sufficiency of the notice. It was, therefore, too late to make such objection in the circuit court. *Little v. Thompson*, 24 Ind. 146.

The appellees challenge the constitutionality of section 10, of the act of 1875, which provides that upon the filing of the report of the reviewers, the commissioners *shall* establish such proposed work as described in the report of the reviewers, etc.

It is claimed that this section denies the parties a hearing, and consequently deprives them of their property without due process of law. As the supposed grievance does not exist in this case, we would not be warranted in considering it. The record shows that on the filing of the report of the reviewers, the cause was submitted to the board of commissioners by the parties; that evidence was heard, and that the commissioners made a formal finding that the proposed work was necessary, that it would be conducive to public health and of public

The State, *ex rel.* Metsker, Guardian, v. Mills *et al.*

utility, and therefore ordered the ditch to be constructed and established as set out in the report of the reviewers.

As the appellees were awarded the hearing that they claim the constitution entitled them to in the commissioners' court, they have nothing to complain of on that score.

On appeal the law provides for a hearing *de novo* in the circuit court, and neither the report of the reviewers nor the judgment of the commissioners will then have any force or effect as the basis of a judgment, or as evidence. *Corey v. Swagger, supra.*

For the error of the Huntington Circuit Court in dismissing the cause, its judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and it is hereby in all things reversed, at the costs of the appellees, and that the cause be remanded to said circuit court, with instructions to overrule the motion to dismiss said cause, and for further proceedings in accordance with said opinion.

Opinion filed at the May term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 8772.

THE STATE, EX REL. METSKER, GUARDIAN, v. MILLS ET AL.

GUARDIAN'S BOND.—*Appointment of Guardian.—Recitals in Bond.—Estoppel of Sureties.*—In an action on a guardian's bond, the sureties therein are estopped by the recital in the bond, executed by them, of the appointment of the guardian, to controvert the fact therein recited that he was such guardian at the time the bond was executed.

SAME.—*Pleading.—Reply.*—A bad reply is a sufficient reply to a bad answer.

SAME.—*New Trial.—Insufficiency of Evidence.*—Where there is no evidence tending to sustain the verdict of a jury, a new trial ought to be granted.

From the Madison Circuit Court.

126 130
148 488
168 704

The State, ex rel. Metsker, Guardian, v. Mills et al.

D. Moss and R. R. Stephenson, for appellant.

T. J. Kane and T. P. Davis, for appellees.

Howk, J.—This suit was commenced by the appellant's relator, as guardian of the person and estate of Clara M. Mills, an infant, against the appellees as defendants, in the Hamilton Circuit Court. The relator's complaint counted upon a penal bond, in the sum of four thousand dollars, bearing date on January 28th, 1870, and executed by the appellee Mills, as principal, and by his co-appellees Joseph R. Gray and Nehemiah H. Baker, as his sureties, to the State of Indiana. The bond appeared to have been taken and approved on the day of its date by the court of common pleas of Hamilton county, and was subject to the following condition :

"The condition of the above obligation is, that as the above bound Elisha Mills, guardian of Frank A. Mills and Clara M. Mills, minor heirs of Martha Wren, deceased, has been ordered by the court of common pleas of Hamilton county, to sell certain real estate of the said wards: Now, if the said Elisha Mills will faithfully discharge the duties of his trust, according to law, then the above obligation is to be void, else to remain in full force in law."

Proper breaches of this condition were assigned by appellant's relator in his complaint, and judgment was therein demanded for two thousand dollars.

The cause having been put at issue, on the relator's application, the venue thereof was changed to the Madison Circuit Court. There, the issues joined were tried by a jury, and a verdict was returned for the appellees, and, over the relator's motion for a new trial, the court rendered judgment on the verdict.

The errors assigned by the appellant's relator, and relied upon by his counsel for the reversal of the judgment below, are the decisions of the circuit court in overruling his demurrer to the first and fourth paragraphs of the answer of the appellees Gray and Baker, and in sustaining the appellees'

The State, *ex rel.* Metsker, Guardian, v. Mills *et al.*

demurrer to the first paragraph of the relator's reply to said first and fourth paragraphs of answer.

We think these errors are well assigned. In each of the first and fourth paragraphs of their answer, the defence stated by the appellees Gray and Baker was in substance, that the appellee Elisha Mills was never, in fact, the guardian of either the person or estate of the said Clara M. Mills. The question presented for decision by the relator's demurrer to the first and fourth paragraphs of answer was, whether the appellees Gray and Baker were or were not estopped by the recitals in the bond in suit, executed by them, to controvert the fact therein recited, that Elisha Mills was the guardian of Frank A. Mills and Clara M. Mills when the bond was executed. This precise question was carefully considered by this court in the recent case of *Gray v. State, ex rel.*, 78 Ind. 68, which was a suit upon the same bond that is now in suit, upon the relation of said Frank A. Mills. In the case cited, it was held that said Gray and Baker were estopped by the recitals in said bond to controvert the fact that Elisha Mills was such guardian when the bond was executed. We are of the opinion, therefore, that the court erred in the case at bar, in overruling the relator's demurrers to the first and fourth paragraphs of answer.

In regard to the first reply of the relator to said first and fourth paragraphs of answer, it seems to us an immaterial question whether or not the facts stated in the reply were sufficient to withstand the demurrer thereto. A bad reply is a sufficient reply to a bad answer. The demurrer to the reply searched the record, and it should have been carried back, we think, and sustained to the paragraphs of answer, to which the reply was addressed, and which, as we have seen, were clearly insufficient. *Aetna Ins. Co. v. Baker*, 71 Ind. 102.

The judgment in favor of the appellees Gray and Baker is reversed, at their costs, and the cause is remanded, with instructions to sustain the demurrers to the first and fourth par-

Percy *et al.* v. Henley.

agraphs of their answer, and for further proceedings not inconsistent with this opinion.

It was also assigned as error, that the circuit court had erred in overruling the relator's motion for a new trial. In this motion it was assigned, *inter alia*, as cause for such new trial, that the verdict was not sustained by sufficient evidence. As to the appellee Elisha Mills, it may be well said that there was absolutely no evidence whatever, tending even remotely, to sustain the verdict of the jury. As to him, therefore, we are of the opinion that the court clearly erred in overruling the relator's motion for a new trial.

The judgment in favor of the appellee Elisha Mills is reversed, with costs, and the cause is remanded, with instructions to sustain the relator's motion for a new trial, and for further proceedings.

No. 8126.

PEARCY ET AL. v. HENLEY.

MARRIED WOMAN.—Lease.—Rents.—Promissory Note.—Heir.—Statute Construed.—A parol lease for three years, by a married woman, of her lands, is not a conveyance or encumbrance of her lands, within the meaning of section 5116, R. S. 1881, and such lease is valid. In such case, if a promissory note be given for the rent and assigned by her during her lifetime, her heir can not recover rents accruing upon the lease after her death.

From the Morgan Circuit Court.

G. W. Grubbs and *M. H. Parks*, for appellants.

W. R. Harrison and *W. E. McCord*, for appellee.

WORDEN, C. J.—Action by the appellee against the appellants to recover rent for certain real estate. The following are the facts found specially by the court, and the conclusion of law thereon:

VOL. 82.—9

82	129
150	485
82	129
162	529

Pearcy et al. v. Henley.

"1st. That Sarah J. Dougherty was the owner, in her lifetime, of the following described lands in said county:" (Here the lands are described.)

"2d. That, during her lifetime, her husband, Thomas Dougherty, leased and rented said lands, together with other lands, with the knowledge, concurrence and assent of said Sarah, to said Percy and Percy, for the years 1875, 1876 and 1877, for \$700 per year, payable the 1st of January, 1876, 1877 and 1878, and that said Pearcys executed their notes therefor, and took possession of and cultivated said land under said lease.

"3d. That the first and second of said notes were paid by said Pearcys, at the maturity thereof, and during the lifetime of said Sarah Dougherty.

"4th. That said Sarah Dougherty died at said county, on the 15th day of January, 1877, and after the beginning of the third rental year of 1877, and left, surviving her, her husband, Thomas Dougherty, who was entitled to one-third of said lands, and one child, the plaintiff herein, who was entitled to the remaining two-thirds of said lands.

"5th. That said note for the rents of the year 1877, executed to Thomas Dougherty, was, before the death of said Sarah Dougherty, and with her knowledge and assent, assigned to one James Lake for value, and was by him so held before the death and at the time of the death of said Sarah Dougherty, of which she had knowledge at the time.

"6th. That on March 19th, 1877, the plaintiff notified the defendants that she was the owner of the undivided two-thirds of said lands, and demanded that the rents thereof for the year 1877 should be paid to her, and also that possession should be rendered to her.

"7th. That the rental value of the undivided two-thirds of the lands in cultivation during the year 1877 was the sum of \$225.

"And the court finds as a conclusion of law arising from the facts, that the plaintiff is entitled to recover of the defendants

Pearcy *et al.* v. Henley.

the said sum of \$225." Exception, judgment for plaintiff, and appeal by defendants.

If the lease was valid, the plaintiff was not entitled to recover, the defendants having given their note for the rent for the year 1877, which, with the knowledge and assent of the plaintiff's ancestor, had been transferred for value to Lake.

The question arises, therefore, whether, under the law as it stood at the date of the lease in question, a married woman could, with the assent of her husband, make a valid parol lease of her real estate for a term not exceeding three years.

The lease in question is found to have been made by the husband, but with the knowledge, concurrence and assent of the wife. It must be deemed, therefore, to have been made by the husband and wife.

The statutory provisions bearing upon the question are the following: The fifth section of the act touching the marriage relation (1 R. S. 1876, p. 550), which is as follows:

"No lands of any married woman, shall be liable for the debts of her husband; but such lands and the profits therefrom, shall be her separate property, as fully as if she was unmarried: *Provided*, That such wife shall have no power to encumber or convey such lands, except by deed, in which her husband shall join."

The fourth section of the act concerning real property and the alienation thereof (1 R. S. 1876, p. 361), reading as follows:

"Conveyances of lands, or of any interest therein, shall be, by deed in writing, subscribed, sealed and duly acknowledged by the grantor, or by his attorney; except *bona fide* leases for a term not exceeding three years."

It may be observed, in passing, that a later statute dispenses with the necessity of any seal to the instrument. See the case of *The American Ins. Co., etc., v. Avery*, 60 Ind. 566.

"Leases not exceeding the term of three years," are excepted from the operation of the first section of the statute of frauds. 1 R. S. 1876, p. 503.

Sperry et al. v. Dickinson et al.

These statutes were passed at the same session of the Legislature, and should be construed together, so that all may have force, if this can be done consistently with the language used.

It is abundantly clear that the Legislature intended that parol leases generally, for terms not exceeding three years, should be valid.

The lands of a married woman, and the rents and profits therefrom, are her separate property as fully as if she were unmarried.

To realize rents, lands must be let; and it seems to us that a lease for a term not exceeding three years is not an encumbrance or conveyance within the meaning of the act touching the marriage relation, construed in connection with the other statutes above noticed.

When the Legislature provided that a married woman should have no power to encumber or convey her lands, except by deed in which her husband should join, they did not intend to make a written lease necessary which would not be necessary in other cases.

We are of opinion that the lease was valid, and that the court erred in concluding that the plaintiff was entitled to recover.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to render judgment for the defendants on the special findings.

No. 9227.

SPERRY ET AL. v. DICKINSON ET AL.

PLEADING.—*Complaint.—Mortgage.*—A complaint which seeks merely to foreclose a mortgage need not exhibit the notes secured by the mortgage.
MARRIED WOMAN.—*Mortgage.—Husband and Wife.*—If a married woman joins her husband in a mortgage of her lands to secure the husband's debt, the mortgage containing a covenant to pay the debt, it is good; otherwise, if she give her note, and the covenant in the mortgage is to pay the note.

Sperry *et al.* v. Dickinson *et al.*

SAME.—A covenant in a mortgage to pay “the sum of money above secured,” referring to a previous description of notes by dates, amount, rate of interest and time of maturity, is an agreement to pay the debt.

SAME.—*Assignment of Mortgage.—Evidence.*—In a suit by an assignee of a mortgage of the wife’s land, an assignment of her notes secured thereby on the mortgage record, though they are void, is a good equitable assignment of the debt, and, when the general denial is in, the assignment is a necessary part of the plaintiff’s evidence against the wife, but the notes are not.

COUNTER-CLAIM.—*Mortgage.—Foreclosure.*—A counter-claim in a suit to foreclose a mortgage, whereby a defendant avers that he holds one of several notes secured by the mortgage, which is not due, and praying that his rights be protected, need not allege that the note is unpaid; nor is a counter-claim bad on demurrer if it pray too much relief.

PRACTICE.—*New Trial.*—Where the finding is joint against two defendants, the evidence being insufficient as to one, both are entitled to a new trial.

From the Steuben Circuit Court.

J. I. Best, for appellants.

J. A. Woodhull and *W. G. Croxton*, for appellees.

BICKNELI, C. C.—This was an action by the assignees of a mortgage to foreclose it. The appellees Julia Dickinson and Emma E. Dickinson were the plaintiffs.

The complaint stated that the defendants Sperry and wife mortgaged the land to Arnold to secure its purchase-money, which was embraced in eleven notes for \$500 each, and one note for \$1,000, all executed by Mrs. Sperry and payable to Arnold, the first one in 1875, and the others in succession annually thereafter, except the note for \$1,000, which was payable in 1877; that the first three of the notes had been paid, the fourth paid in part, and that the fifth, sixth, seventh and eighth of the \$500 notes and the \$1,000 note had been endorsed by Arnold to the plaintiffs, and that Arnold had assigned to the plaintiffs, by a writing on the record of the mortgage, so much of the mortgage as secured the notes so endorsed; that Arnold had sold another of the \$500 notes to the defendant Enos Michael, and had died the owner of the other two of said notes which had come into the hands of his executor, the defendant Henry H. West, who was required to

Sperry et al. v. Dickinson et al.

answer as to said assignment of the mortgagee. The complaint demanded foreclosure only. The defendants West and Michael filed cross complaints, demanding that their interests should be protected in the decree.

There was a trial by the court, with a finding and judgment for the plaintiffs, that the property be sold to pay them the amounts due, and to become due, with a rebate of interest, and that the proceeds of the sale should be applied, 1st, in payment of costs; 2d, in payment of plaintiffs; 3d, in payment of the ninth note for \$500 to the defendant West; 4th, in payment of the tenth note for \$500 to the defendant Michael; 5th, in payment of the eleventh note for \$500 to the defendant West, with a proper rebate of interest upon the notes not due. From this judgment Sperry and wife, the mortgagors, appealed.

One of the errors assigned is, that the demurrer to the complaint was overruled; another is, that the complaint does not state sufficient facts, etc. The only objection made to the complaint is, that copies of the notes are not made parts of the complaint.

The suit being upon the mortgage only and not upon the notes, it was not necessary that the notes, or copies of them, should be filed with the complaint. *Shin v. Bosart*, 72 Ind. 105; *Ragsdale v. Parrish*, 74 Ind. 191; *Morgan v. S. A. Organ Co.*, 73 Ind. 179; *Keith v. Champer*, 69 Ind. 477. The complaint was sufficient.

Another error assigned is, that the court sustained the plaintiffs' demurrer to the first, second and third paragraphs of the answer of Sperry and wife.

The first and second of these paragraphs alleged that Mrs. Sperry was a married woman and owned the land when the notes and mortgage were executed. The third paragraph was pleaded as to the claim for \$1,000, and stated that, when the note for \$1,000 and the mortgage were executed, Mrs. Sperry was a married woman and owned the land, and that said note was given solely for her husband's debt.

When a married woman gives her own note for her hus-

Sperry *et al.* v. Dickinson *et al.*

band's debt, and she and her husband join in mortgaging her land to secure that debt, and in the mortgage expressly agree to pay the debt, that mortgage may be foreclosed. *Brick v. Scott*, 47 Ind. 299; *Hubble v. Wright*, 23 Ind. 322; *Layman v. Shultz*, 60 Ind. 541. But if the mortgage contain no stipulation to pay the debt, it can not be foreclosed. In *Brick v. Scott*, *supra*, this court said that the promissory note of a married woman is absolutely void, and that where the agreement in the mortgage is to pay void notes, without any agreement to pay the debt for which the notes were given, there can be no foreclosure, because there is no description or identification of the debt intended to be secured.

In the present case the stipulation in the mortgage is, "The mortgagors expressly agree to pay the sums of money above secured," and said sums of money are previously stated in the mortgage thus: "Twelve notes of even date herewith, eleven of \$500 each, due in 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 years, with 6 per cent. interest, and one of \$1,000, due in 3 years, with 10 per cent. interest, to be paid annually."

The appellants insist that, under the authority of *Brick v. Scott*, *supra*, there can be no foreclosure here, "for the reason that the notes are void, and there is no promise in the mortgage to pay the debt for which the notes were given." They say, "it is true that the mortgagors expressly agree to pay the sums of money above secured, but this adds nothing to it, for the reason that there are no 'sums above secured.'"

In *Brick v. Scott*, *supra*, the mortgage was given "to secure the payment of the following described notes," and there was no separate agreement to pay any money; but here the sums are stated, and there is a separate agreement, in substance, to pay the sums above mentioned, or the above sums. There is, therefore, a sufficient identification and description of the debt to be paid, which there was not in *Brick v. Scott*, *supra*.

There was no error in sustaining the demurrers to the first, second and third answers of the defendants Sperry and wife. Another error assigned is, overruling the demurrer of the de-

Sperry et al. v. Dickinson et al.

defendants Sperry and wife to the cross complaint of Enos Michael. The objections made to this cross complaint are:

1. That Michael's note or a copy of it was not filed therewith.

2. That the cross complaint failed to aver that said note was unpaid.

The answer to these objections is, that the cross complaint was not seeking a judgment on the note. Its prayer was, that if the plaintiffs should obtain a decree of foreclosure, then there might be a finding and decree upon the mortgage to the extent of Michael's interest. It appeared by the cross complaint that Michael's note was not due; in such a case it was not necessary either to make the note an exhibit, or to allege that it was unpaid. There was no error in overruling the demurrer to the cross complaint of Michael. Another error assigned is, overruling the demurrer of the defendants Sperry and wife to the first paragraph of the cross complaint of West, executor.

The objections made to this paragraph are, that the notes held by West, executor, were not due, and that the paragraph claims too much relief. The paragraph, after stating the execution of the mortgage, and the payment of some of the notes, and the transfers of others, and that West, as executor, holds the ninth and eleventh of said \$500 notes, and that the mortgaged land will not pay the mortgage debt, and that the mortgagors are both insolvent and without any property, except said land, of which any part of said debt can be made, prays that the lien of the executor may be enforced, and that he may have foreclosure, and all other proper relief, and that a receiver may be appointed of the rents and profits.

This paragraph shows that the executor was entitled, on a decree of foreclosure in favor of the plaintiffs, to have his interest considered and protected in the decree; it is no valid objection in such a case that the sum secured to the cross complainant is not yet due, nor that the cross complaint de-

Sperry et al. v. Dickinson et al.

mands too much relief. There was no error in overruling the demurrer to the first paragraph of the cross complaint of the defendant West.

It is also assigned as error that the court sustained the demurrers of the defendants Michael and West to the joint answers of Sperry and wife to each of their cross complaints.

These answers simply averred that the notes held by Michael and West, respectively, were not due.

It follows, from what has been already said, that there was no error in sustaining these demurrers.

All the assignments of error discussed in the appellants' brief have now been disposed of, except the overruling of the motion for a new trial.

Two only of the reasons alleged for a new trial are discussed in the appellants' brief, viz. :

1. That the decision is not sustained by sufficient evidence.
2. That the damages are excessive.

The appellants claim that the mortgage specifies no rate of interest, and that, therefore, only six per cent. interest can be allowed. But the sums of money which the mortgagors expressly agree to pay are eleven sums of \$500, with interest at six per cent. from a given day, and one sum of \$1,000, with interest at ten per cent. from a given day. When the mortgagors agreed to pay the sums above mentioned, they agreed to pay the interest mentioned, as well as the principal. The damages were not too large.

As to the evidence, the bill of exceptions shows that the notes held by the plaintiffs and mentioned in the mortgage were read in evidence against Jackson E. Sperry only, and that the mortgage was then read in evidence as against Jackson E. Sperry and Betsey Sperry, and that the assignment by Arnold entered upon the mortgage record was then read in evidence as against Jackson E. Sperry only. It was as follows :

"I acknowledge full pay on the first notes described in this mortgage, and assign the following notes to Julia and Emma Dickinson, to wit: The 4, 5, 6 and 7 notes of \$500 each, and

Sperry *et al.* v. Dickinson *et al.*

the one note calling for \$1,000, except one hundred dollars in last described note. I also assign the 8th note of \$500 to Mary Barnes, this 26th day of March, 1877.

“MARTIN ARNOLD.”

Although the notes mentioned in this writing are the notes of a married woman, and are, therefore void, yet the writing was an equitable assignment of so much of the mortgage debt as is therein mentioned, and carried with it an assignment *pro tanto* of the mortgage itself. It was not necessary to prove the execution of the writing, because it had not been denied on oath. *Belton v. Smith*, 45 Ind. 291; *Keller v. Boatman*, 49 Ind. 104. But it was necessary to read it in evidence as against both of the mortgagors, in proof of the plaintiffs' title; it was not read as against Betsey Sperry; therefore, as to her, the evidence was incomplete. *Jackson Township v. Barnes*, 55 Ind. 136; *Keith v. Chamber*, 69 Ind. 477.

The appellants claim also that the notes ought to have been read in evidence as against Betsey Sperry; but, in an action on a mortgage alone, it is not necessary even to read the notes in evidence. This was decided in *Arnold v. Stanfield*, 8 Ind. 324. This case seems not to have been overruled, although a doubt was suggested in regard to it in *Hawes v. Rhoads*, 34 Ind. 79. The mortgagors, by the execution of a mortgage, are estopped from denying the existence of notes secured thereby; therefore, in this case, the notes, even if valid, need not have been read in evidence as against either of the defendants.

The evidence was sufficient as against Jackson E. Sperry, but the finding and judgment being against both the mortgagors, and the evidence being insufficient as to one of them, both were entitled to a new trial, and the reason alleged for the new trial to wit, that the finding was not sustained by sufficient evidence, is sufficiently specific for such a case. *Graham v. Henderson*, 35 Ind. 195.

The court erred in overruling the motion for a new trial, and its judgment should be reversed and a new trial ordered.

 Bilsland, Executor, v. McManomy.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellees, and this cause is remanded for a new trial.

 No. 8935.

BILSLAND, EXECUTOR, v. McMANOMY.

82 139
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CONTRACT.—*Consideration.*—*Merger.*—*Release of Surety in Judgment.*—R. recovered a judgment on a note against B. and M., the latter being surety. Theretofore, B. had made his note to S. for \$2,500, and to secure that and to indemnify M. had executed a mortgage to S. and M. upon 300 acres of land. Afterwards, in pursuance of an agreement between all of said parties, B. paid R. \$1,000 on the judgment, and conveyed forty acres of the land to S., in satisfaction of his demand, and M., for the purpose of releasing the forty acres from the lien of the mortgage, assigned the same to S., R. at the same time agreeing to release M. from the judgment. *Held*, in an action by M. to enjoin the levy and sale of his property under the judgment, that the agreement was upon a sufficient consideration and binding on R. and his executor, and was not merged in a subsequent written release, made without M.'s knowledge, by R. to B.

MORTGAGE.—*Misdescription.*—*Assignment of Record.*—The effect and validity of an assignment of record of a mortgage are not affected by the fact of an error in the record in respect to the description of the premises.

FORMER ADJUDICATION.—*Action to Enjoin Enforcement of Judgment.*—The judgment, in an action by two to enjoin the enforcement of a joint judgment against them, is no bar to a separate action by one of them to enjoin the enforcement of the same judgment against him, on grounds personal to himself, and in which his co-defendant has no interest.

SAME.—*Pleading.*—*Joint Plaintiffs must have Joint Cause of Action.*—*Injunction.*—A complaint must show a joint cause of action in favor of all the plaintiffs; and parties having separate causes of action, though they seek the same relief, as a rule, can not join in one complaint, and this rule applies to an action to enjoin the enforcement of a judgment against two or more, who each have separate grounds for the injunction, of such character as not to be available for each and all of the judgment defendants.

From the Fountain Circuit Court.

Bilsland, Executor, v. McManomy.

L. Nebeker, S. M. Cambern and H. H. Stilwell, for appellant.
S. F. Wood, for appellee.

WOODS, J.—The only question to be considered in this case is whether the finding of the court was according to the law and the evidence.

The action was by the appellee to enjoin the seizure and sale of his property upon an execution in favor of the appellant as the executor of the last will of David Rawles, the ground of the application for the injunction being an alleged parol release of the appellee from the judgment on which the execution issued, made by Rawles in his lifetime, for a consideration named in the complaint. The defences pleaded are the general denial, no consideration for the release, and former adjudication.

We are of opinion that the finding and judgment of the circuit court are right.

The evidence shows that Rawles, in his lifetime, had recovered a judgment against the appellee McManomy and one Robert D. Brown, McManomy being surety for Brown in the note on which the judgment had been rendered, as well as in other obligations, and Brown, being also indebted to one Cyrus Rush in the sum of \$2,500, had made his notes to Rush for that amount, and a note to McManomy for \$7,000, and to secure these notes had executed a mortgage upon his real estate, comprising three hundred acres or more, intended, so far as the appellee was concerned, to indemnify him against loss on account of his suretyship for Brown. The lien of this mortgage was prior to that of Rawles' judgment.

Afterwards it was agreed between Rawles, Brown, Rush and McManomy that Brown should pay Rawles \$1,000, and convey forty acres of the mortgaged land to Rush in payment of the sum due Rush upon the mortgage; that McManomy should release the mortgage in respect to the forty acres so conveyed, and Rawles should release McManomy from further liability upon his judgment.

Bilsland, Executor, v. McManomy.

Upon this understanding Brown did then and there pay to Rawles \$1,000, conveyed to Rush, and Rush accepted, the forty acres in discharge of his claim, and the appellee entered upon the margin of the record of the mortgage an assignment of his interest therein to Rush. By reason of a mistake in the recording of the mortgage, the forty acres so conveyed to Rush, and intended to be released by the appellee, was misdescribed in the record of the mortgage, though properly described in the original instrument.

While the assignment so made by the appellee was in terms an assignment of his entire interest in the mortgage, he and Rush each testified that the intention was to have made an assignment of the appellee's interest in the forty acres only, and for the purpose of showing this, Rush afterwards, without the knowledge of the appellee, caused an interlineation to be made by the recorder in the entry of the assignment, but this was done in such a manner as to be unintelligible.

After the making of the agreement already recited, and the conveyance by Brown to Rush, and the assignment of the mortgage by the appellee as stated, Rawles and Brown, without the knowledge of the appellee, came to an understanding, upon which Rawles signed and delivered to Brown the following writing, to wit:

“COVINGTON, IND., October 31st, 1876.

“This is to certify that I have this day agreed, for consideration paid, to not attempt to collect a judgment in my favor, against Robert D. Brown and James McManomy, taken in the court of common pleas of Fountain county, Indiana, and by and with the consent of the said McManomy.

(Signed) “D. RAWLES.”

Upon the death of Rawles, the appellant, Bilsland, qualified as the executor of his last will, and caused an execution to be issued against the property of the appellee and Brown, who, however, had become insolvent, and for the purpose of enjoining the enforcement of that writ, at the December term of the Fountain Circuit Court, 1878, McManomy and Brown

Bilsland, Executor, v. McManomy.

together brought a suit against the same parties who are sued in this case, setting out as ground therefor the above writing made by David Rawles. There was an answer of general denial and of want of consideration, a trial, finding and judgment for defendants, and a bill of exceptions by which the evidence was made part of the record.

An examination of the evidence adduced on that trial shows that the decision of the court must have been based upon the fact that there was no consideration for the writing delivered by Rawles to Brown.

The appellants now advance the following propositions:

"First. The parol release, set up in the complaint, was merged in the writing signed by Rawles, and delivered to Brown on the same day, and afterwards sued on by Brown and McManomy.

"Second. The parol release, relied on, was not supported by a sufficient consideration.

"Third. The question whether the Rawles estate has the right to collect the judgment was adjudicated in the former action."

It sufficiently appears from the statement already given, that the parol agreement on which the present action is predicated had no direct connection with the writing delivered by Rawles to Brown, whatever may have been its effect as an inducement to the making of that instrument. The parties to the two agreements were different; the considerations therefor, so far as there were considerations, were different, and we perceive no reason for holding that the first was merged in the latter.

The complaint and the evidence show a sufficient consideration for the parol agreement on which this action is prosecuted.

Aside from the payment of money by Brown to Rawles, which, it is claimed, was no consideration, because the payment of what was due, is the fact that the agreement has been performed by Brown and Rush in the conveyance of the land, and by the appellee in the assignment of the mortgage.

Bilsland, Executor, v. McManomy.

The transaction, moreover, resulted to the benefit of Rawles beyond the mere receipt of money from his debtor, in that he secured the release of Brown's lands, except the portion conveyed to Rush, from the lien of Rush's mortgage; and on the part of Rush there was a surrender of his prior lien upon 300 acres, and an acceptance of forty acres in full payment, which, if there had been no legal benefit to Rawles in the transaction, would have been such a detriment to Rush as to afford ample consideration for the mutual agreement which was made.

It is argued that the appellee's agreement was with Rawles, was executory and has not been performed, and that, as Rawles, in receiving the \$1,000 from Brown, obtained all he bargained for, his executor could not enforce the agreement against the appellee, and hence no one can enforce it.

But this is not the case presented. The appellee's agreement was not with Rawles alone. It was with Rush and Brown as well, and was performed or attempted to be performed by all the parties. What was to be done by Rush and Brown, they did, and so were in a position to enforce performance by the appellee. The appellee attempted to perform, by assigning the mortgage of record to Rush; and that assignment was not ineffective because of the mistake in the recording; and it was immaterial to Rawles, if not a benefit to him, that the assignment was of the entire interest of the appellee in the mortgage. If the assignment did not operate as an extinguishment of the appellee's interest in the security, the assignee, being cognizant of the rights of all the parties, could not have put the mortgage to any unjust use, to the injury of Rawles.

The argument is advanced that the assignment of the mortgage, without assigning the debt secured by it, was a nullity, and therefore amounted to nothing. In support of this proposition, counsel have cited *Johnson v. Cornett*, 29 Ind. 59, and *Hubbard v. Harrison*, 38 Ind. 323. In the latter case is a

dictum to that effect, but neither case decides the point. See *Ottman v. Moak*, 3 Sandf. Ch. 431; *Jones Mortgages*, 805.

Be the general rule on this subject as it may, in the case before us, to say the least, while the appellee held a note, he held no debt—the note and mortgage being intended for indemnity only, and having no other consideration; and the appellee having agreed with Rush and the other parties named to release that mortgage from the part of the land conveyed to Rush, and having made the assignment for the purpose of executing that agreement, he was to that extent bound by it, though possibly entitled to a modification of the assignment so as to confine its effects to the forty acres only, and to preserve his lien upon the remainder of the land as indemnity against the other obligations of Brown on which he became surety.

The alteration of the assignment, made as it was, without the knowledge or consent of the appellee, can not affect his rights as against the representative of Rawles.

In respect to their last proposition, counsel insist that the appellee might have made his alleged parol agreement a cause for the injunction in the first action, and, that not having done so, he is precluded by the judgment in that action from seeking the same relief, for that cause, in this action.

After citing Wells on Res Adjudicata, sections 266, 248, *Henderson v. Henderson*, 3 Hare, 100, 115, *Bell v. McColloch*, 31 Ohio St. 397, and *Betts v. Starr*, 5 Conn. 550, counsel say: "We insist, that whatever questions would have been covered by a judgment for the plaintiffs, were covered by a judgment for defendant. That if Brown and McManomy had obtained their injunction, it would have protected their several property, as well as any joint property, and that any attempt whatever by the Rawles estate, to enforce collection from either, would have been a contempt. That in order to determine fully the rights of Rawles, as against each and all of the judgment defendants, it was not necessary to have three lawsuits.

Bilsland, Executor, v. McManomy.

"It was necessary that the complaint in the former suit should show that both of the plaintiffs were entitled to the same relief, but not, as we understand, upon the same precise grounds. Creditors may join in setting aside a fraudulent conveyance. All the facts connected with the making of the conveyance may be relied on, though the facts may not operate equally in favor of all."

The argument reveals its own weakness. In the joint action of the appellee and Brown to enjoin the collection of the judgment, they could avail themselves only of joint causes of action, or such causes as enured to the benefit of both, and neither of them could have pleaded or proved a separate release, which was not available to the other. Brown was the principal debtor, and the appellee only surety, in the judgment, and consequently a personal release of the appellee did not affect the liability of Brown.

It is true, that under the 368th section of the code of 1852, R. S. 1881, section 568, the court may render judgment for or against a part of the plaintiffs; but it is nevertheless true that the complaint in each case must show a cause of action in favor of all who join in it, otherwise it will be subject to demurrer; and each paragraph of the complaint must show a cause of action in favor of all the plaintiffs. Parties having separate causes of action may not join in one complaint, setting up their several causes of action either in the same or in different paragraphs. *Harris v. Harris*, 61 Ind. 117, and cases cited.

If there are any exceptions to this rule, the action to enjoin the enforcement of a judgment by different defendants, on separate and distinct grounds, is not one of them.

Judgment affirmed, with costs.

VOL. 82.—10

Baker v. Baker.

No. 9385.

BAKER v. BAKER.

DIVORCE.—Insanity after Marriage.—Failure to Provide.—Statute Construed.—

Insanity arising subsequent to marriage is not a cause for divorce, nor is a failure to provide a support for the wife by the husband, resulting from such insanity. The statutory cause of the failure of the husband to make provision for his family, section 1032, R. S. 1881, does not apply where such inability arises from mental or physical disease.

From the Dearborn Circuit Court.

O. F. Roberts, for appellant.

ELLIOTT, J.—It appears from the appellant's complaint that she and the appellee were married in June, 1867; that they lived together as husband and wife until 1874, when the husband became insane, and since that time has been confined in the hospital for the insane, and has wholly failed to provide appellant with food, clothing or shelter.

Appellant is not entitled to a divorce. Insanity is no reason for dissolving the marriage. The statute does not make it one of the grounds for divorce, and surely no principle of justice or morality will justify the severance of the marital ties for any such cause. The judgment and conscience revolt at the thought that such a terrible affliction should be deemed cause for separating the wife from the husband. Divorces are granted not because of misfortune, but because of fault. It would be a barbarous code that would allow the wife to put aside the husband because stricken by such an awful calamity as the loss of reason.

There is no merit in the argument that the statute requires that a divorce be granted in all cases where the husband fails to provide for the wife. The statute was not meant to apply to cases where the inability to make provision arises from mental or physical disease.

Judgment affirmed.

 Turner v. Buchanan *et al.*

No. 8608.

TURNER v. BUCHANAN ET AL.

NEGLIGENCE.—*Verdict.*—*Special Findings.*—*Contributory Negligence.*—In a suit for negligently placing a steam engine in a street, whereby the plaintiff's team was frightened, and he was injured, the jury found a general verdict for the plaintiff, and, in answer to special questions submitted, that both of plaintiff's horses had previously run off; that the engine was calculated to scare a team not disposed to be frightened; that the plaintiff saw the engine in time to avoid danger, but did not apprehend any.

Held, that the facts specially found did not show contributory negligence on the part of the plaintiff, and were not inconsistent with the general verdict, and that judgment for the defendant thereon was erroneous.

From the Huntington Circuit Court.

J. C. Branyan, C. W. Watkins and M. L. Spencer, for appellant.

W. H. Trammel and T. L. Lucas, for appellees.

MORRIS, C.—The appellant brought this suit against the appellees to recover damages for injuries alleged to have been caused by the negligent and wrongful acts of the appellees.

The complaint is in two paragraphs. The first states that the appellees, on and prior to the 4th day of June, 1878, caused to be placed and maintained in one of the public streets of the city of Huntington, known as Fort Wayne street, a portable steam engine, thereby, in violation of an ordinance of said city, which is set out and made part of this paragraph, partially obstructing the passage of persons and teams along and upon said street; that said portable engine, so placed and maintained in said street, was liable to frighten teams being driven along the same; that, on said day, the appellant's team, hitched to a wagon, while on said street, took fright at said engine so unlawfully placed and maintained by the appellees on said street as aforesaid, and, in spite of the appellant, who was in said wagon and driving said team, and without fault on his part, became unmanageable and ran away with great speed and violence, throwing the appellant from his said

89	147
126	307
82	147
143	429
82	147
149	73

82	147
171	498

Turner v. Buchanan *et al.*

wagon, with great force and violence, whereby he was greatly and permanently injured and crippled for life, etc., to his damage \$4,000.

The second paragraph of the complaint was similar to the first, though stating the facts in greater detail, and omitting the ordinance of said city set out in the first paragraph.

The defendants appeared and demurred separately to each paragraph of said complaint. The demurrers were overruled.

The appellees then filed a general denial to the complaint, and the case was submitted to a jury for trial, who returned a verdict against the appellees and in favor of appellant, for \$900, and the following answers to the following interrogatories, properly submitted to them by the court, at the instance of the appellees:

"1. Was the plaintiff's team in the habit of running away?

Ans. No.

"2. Had both of the horses that plaintiff was driving previously run off? Ans. Yes.

"3. Had plaintiff's team tried to run off almost immediately previous to the time plaintiff complains of in this cause?

Ans. No.

"4. Did the plaintiff see the portable engine before he was near to it, and in time to have avoided the danger? Ans. Yes; but apprehended no danger.

"5. Did the portable engine possess any qualities calculated to scare a team that was not disposed to frighten? Ans. Yes.

"6. Did the foot-crossing of the street and the rattling and jamming forward of the plaintiff's load of staves, in crossing the same, tend to scare and frighten plaintiff's team? Ans. Yes, it added more fright to the team.

"7. Was not the plaintiff's injury caused by his jumping off his loaded wagon? Ans. Yes.

"8. Would plaintiff likely have been hurt so badly, had he remained upon his wagon and load? Ans. Do not know.

"9. Would an ordinarily prudent man have jumped off of

Turner v. Buchanan *et al.*

his wagon when going at the rate of speed the plaintiff's team was? Ans. Yes, in like circumstances."

The appellees moved the court for judgment upon the special findings of the jury, on the grounds, as stated in the motion, "that the special findings are inconsistent with the general verdict of the jury, and show that the plaintiff contributed to his injury." The court, over the objection of the appellant, sustained the motion and rendered judgment for the appellees, to which the appellant properly excepted.

The appellant moved the court for judgment in his favor upon the general verdict, which motion was overruled, and he excepted.

The appellant also moved the court for a new trial, on the ground that the court erred in overruling his motion for judgment upon the general verdict. It can hardly be believed that the appellant in fact desired a new trial. However this may be, his motion states no cause for which a new trial could be granted, and it will not be further noticed.

Are the special findings of the jury inconsistent with the general verdict? It will not be pretended that the answer to the first, third, fifth or ninth interrogatories is at all in conflict with the general verdict. By their answers to those interrogatories, the jury find that the appellant's team was not in the habit of running off; that said team had not, immediately before the accident, tried to run off; and that the appellees' engine was calculated to scare teams not disposed to be frightened. Nor is there anything in these answers that shows, or tends to show, negligence on the part of the appellant.

The answer to the second interrogatory stated that the horses of the plaintiff had both run off; but when, and under what circumstances, is not stated. There is nothing wrong in driving a team along the streets of a town or city, which had, years before, run away. Nor is there anything in such use of such a team, from which negligence can be inferred. Though the horses may have, many years before, run away, the team, at the time of the accident, may have been gentle

Turner v. Buchanan et al.

and easily managed. There is nothing in the answer to the second interrogatory inconsistent with the general verdict, or that, taken in connection with the general verdict, shows the appellant to have been guilty of contributory negligence. *Foshay v. Town of Glen Haven*, 25 Wis. 288 (3 Am. R. 73).

In answering the fourth interrogatory the jury find that the appellant saw the portable engine in the street in time to have avoided it, but that he apprehended no danger. Believing, as the jury find the appellant did, that there was no danger in driving his team along the street and past the engine improperly placed in the street by the appellees, he was not guilty of negligence in attempting to do so. For aught that appears, he was driving the team with due care and had it under his control. The mere fact that he could see the engine in the street did not impose upon him the duty of abandoning the street, or of stopping to inspect the engine, and determine, at his peril, whether it would probably frighten his team. *Jones v. Housatonic R. R. Co.*, 107 Mass. 261; *Reeves v. Delaware, etc., R. R. Co.*, 30 Pa. St. 454; *Humphreys v. Armstrong County*, 56 Pa. St. 204. The appellant, though he saw the engine, was not bound to anticipate all the perils to which he might be exposed in driving past it, or to refrain absolutely from pursuing his usual course on account of unseen and unknown, though probable, risks. Some risks, such as arise from obstructions in highways, are taken constantly by the most prudent of men, and where, as in this case, the party pursues the usual course, believing it to be safe, he is not guilty of contributory negligence. It was a question for the jury, and by their general verdict they have found upon this point in favor of the appellant, and with it this special finding is not irreconcilable, or necessarily inconsistent.

To the sixth interrogatory the jury answered, that the foot-crossing on the street, and the "jamming forward" of the load of staves, added to the fright of the team. The loading of the appellant's wagon with staves was not an act of negligence on his part, and that the running of the team, the rapid

Turner v. Buchanan *et al.*

motion of the wagon, and the consequent rattling of the staves, and the displacement of the load, should have added to the fright of the team, is probable; but, as this was the result of the original fright caused by the wrongful act of the appellees, the appellant should not be held responsible.

There is nothing in this answer inconsistent with the general verdict, or that shows negligence on the part of the appellant.

In answer to the seventh interrogatory, the jury say that the appellant's injury was caused by his jumping from his wagon. But this must be taken in connection with the general verdict. It is not to be expected that a person, acting under the excitement and confusion of mind incident to the appellant's situation; will always be able to do the best thing that, under the circumstances, could possibly be done. If he acts as ordinarily prudent men would act in view of the emergency, that is all the law requires. There is nothing, therefore, in this finding inconsistent with the general verdict. The special answer to the ninth interrogatory, which is upon this point the same as the general verdict, finds that a prudent man, acting under the same circumstances, would have done just what the appellant did. *Eldridge v. Long Island R. R. Co.*, 1 Sandf. 89; *Ingalls v. Bills*, 9 Met. 1; *Railroad Co. v. Aspell*, 23 Pa. St. 147; *Frink v. Potter*, 17 Ill. 406.

There is nothing in the answer to the eighth interrogatory. The jury say that they do not know that the appellant would have been so badly injured had he not jumped from the wagon; this is all.

The answers to the interrogatories, taken singly or collectively, are consistent with the general verdict, and do not show that the appellant was guilty of contributory negligence.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees, and that the court be instructed to render judgment upon the general verdict in favor of the appellant and against the appellees, for the amount found by the jury, with interest

Turner v. Buchanan et al.

thereon from the return thereof until judgment shall be rendered in accordance with this instruction.

ON PETITION FOR A REHEARING.

MORRIS, C.—The appellees ask a rehearing in this case, on the ground that, as they contend, the opinion reversing the judgment below is contrary to the uniform rulings and decisions of this court upon the questions involved.

Upon the trial, the jury returned a general verdict in favor of the appellant, with answers to interrogatories submitted by the appellees. It is insisted that the answers returned by the jury to the interrogatories are irreconcilable with the general verdict, and must control it; that the answers to the interrogatories show that the appellant was guilty of negligence contributing to the injury of which he complained, and that the appellees were, therefore, entitled to judgment upon these findings, notwithstanding the general verdict.

The answers to the interrogatories, which are claimed to be inconsistent with the general verdict, are:

“Had both of the horses that plaintiff was driving previously run off? Answer. Yes.

“Did the portable engine possess any qualities calculated to scare a team that was not disposed to frighten? Answer. Yes.

“Did the plaintiff see the portable engine before he was near to it, and in time to have avoided the danger? Answer. Yes; but apprehended no danger.”

The answer to the first of the above interrogatories, obviously, is not in any way inconsistent with the general verdict, which found the appellant to be without fault and free from negligence. The answer does not find at what time, how many years before the accident, the horses had run off. They might have run off years before, and yet have been perfectly gentle and manageable at the time of the accident. And this answer, in connection with the general verdict, must be held to mean this and nothing more.

Turner v. Buchanan et al.

The answer that "the portable engine had qualities calculated to scare a team not disposed to frighten," is not only not inconsistent with, but confirmatory of, the general verdict.

If the engine had no qualities calculated to frighten teams, it would be difficult to support a verdict which gives a party damages for the alleged fright of a team by such an engine. The general verdict implied just what the jury found in answer to this interrogatory. It can not, therefore, be said to be inconsistent with the general verdict.

The jury, in answer to the fourth interrogatory, say: "The plaintiff saw the portable engine before he was near to it, and in time to have avoided the danger, but he apprehended no danger."

Is this answer irreconcilable with the general verdict? and does it show that the appellant was guilty of contributory negligence?

The jury, by this answer, do not find that the appellant saw or knew the danger to which he might be exposed in passing the engine, wrongfully placed and maintained in the street by the appellees. On the contrary, it is expressly found that he did not—that he apprehended no danger. He saw the engine, the obstruction, in the street—this was all—and apprehended no danger from passing it. It is of the very nature of an obstruction in a highway or street, which is calculated to frighten teams, to be visible. For anything that appears, teams had been driven daily past the engine, which had been wrongfully in the street for months. Teams may be driven past such an obstruction without taking fright. It could not be foreseen or predetermined whether the team would at all times, or this particular time, take fright at the obstruction, though calculated to frighten teams. The appellant was, therefore, not guilty of negligence in attempting to drive his team past the obstruction in question. It was a risk he might take without negligence on his part. The law upon this subject is well stated by Shearman and Redfield on Negligence. They say, sec. 31: "Nor even where the plaintiff sees that the defendant has been

Turner v. Buchanan *et al.*

negligent, is he bound to anticipate all the perils to which he may *possibly* be exposed by such negligence, or to refrain absolutely from pursuing his usual course on account of risks to which he is *probably* exposed by the defendant's fault. Some risks are taken by the most prudent men; and the plaintiff is not debarred from recovery for his injury, if he has adopted the course which most prudent men would take under similar circumstances." This doctrine has often been applied, and is peculiarly applicable to cases like this. The obstruction is seen in the street; there is room to pass it; it is not known that it will cause fright, and the traveller, with due care, knowing the temper of his horses and having control of them, believing there is no danger, attempts to pass. In doing this, he is not guilty of negligence; he takes the risk which a prudent man would take, and nothing more. Such an assumption of risk affords no excuse for the wrong-doer—the party who wrongfully placed the obstruction in the street.

In the case of *Judd v. Fargo*, 107 Mass. 264, where a farmer had left a sled with tubs upon it in the highway, calculated to frighten horses, at which the plaintiff's horse took fright in being driven past it, and was killed, it was not pretended, or even claimed, that the plaintiff was guilty of contributory negligence, though the obstruction could be seen for a considerable distance.

In the case of *Jones v. Housatonic R. R. Co.*, 107 Mass. 261, the same doctrine is held. It appeared in this case that the railroad company, at the crossing of the highway, maintained a derrick for the purpose of loading and unloading freight. The derrick had an upright shaft twelve feet high, and a horizontal arm fourteen feet long, so located that the arm might be swung north, and then the freight suspended from it would hang about four feet within the located limits of the road, but ten or twelve feet from the travelled track of the same. There was conflicting testimony as to how far the derrick could be seen, some of the witnesses said ten or twelve rods; others that it could be seen only for a short distance. The

Turner v. Buchanan *et al.*

evidence showed that the plaintiff's horse had shied at a box car some distance from the derrick; that, shying, the horse turned south, and was then frightened by the derrick. The court held the plaintiff entitled to recover.

In the case of *Foshay v. Town of Glen Haven*, 25 Wis. 288, it was held that the defendant was liable for an injury resulting from the fright of a horse at a large black log left in the highway by the defendant, though not in the travelled path of the road. The horse was frightened as the defendant drove past. Though the obstruction was visible, it was not claimed that the plaintiff was guilty of negligence in driving past it, with due care. *Morse v. Richmond*, 41 Vt. 288; *Johnson v. Belden*, 2 Lans. N. Y. 433. In this case the court quote the rule as laid down by Shearman and Redfield above, and say that it is fully sustained by the case of *Clayards v. Dethick*, 12 Q. B. 439.

The appellees say, that the question in Wisconsin and the New England States is governed by the statutes of those States. True, in most of those States there are statutes making towns liable for the non-repair of highways, but there is no statute in any of them upon the subject of contributory negligence. The law upon that subject, the only question here involved, is the common law, the same law that is in force in Indiana.

It is said that the decision of this court, in the case of *Thompson v. Cincinnati, etc., R. R. Co.*, 54 Ind. 197, is opposed to the ruling in this case. The decision in the former case rests upon the fact that the danger was not only apparent, but believed and known to exist, by the plaintiff, at the time the accident occurred; that, with such knowledge, and believing the passage of the street to be dangerous, he ordered his servant to get out of the wagon and take the horse across the street. The court very properly held that, under such circumstances, the plaintiff assumed the risk and proceeded at his peril. In this case, though the engine was seen, the danger was not apprehended or believed to exist. The facts

upon which the decision rests in the case cited are absent in the case now before us.

It is also said that the case of *President, etc., v. Dusouchett*, 2 Ind. 586, is opposed to the conclusion reached in this case. In that case it was held that, where the plaintiffs alleged in their declaration that they knew the location and situation of a boiler before the rise of the river, and that, after the rise of the river, they could not see it and ran their boat upon it, they were shown to have been guilty of negligence, which would defeat a recovery. The court simply held that, where a party runs his boat voluntarily upon a known obstruction, he can not recover for the injury sustained by the collision. There is nothing in this decision inconsistent with the opinion in this case.

There are many cases holding, that where a party carelessly drives upon a known obstruction, wrongfully placed in the highway, or against a vehicle wrongfully occupying the wrong side of the street, he can not recover for an injury sustained by such collision, because of his own negligence. But this class of cases, which may be found in the reports of every State, and in all the text-books, has no application to this case, for the reason that here the danger was not foreseen; the appellant did not know that his team would take fright, but believed the contrary, and, so believing, with due care, attempted to pass the obstruction. He was, as the general verdict finds, free from fault.

In the case of *Thomas v. Western U. T. Co.*, 100 Mass. 156, the court say: "Because there is an obstacle to proceeding" on a highway, "it does not follow that it is not consistent with reasonable care to attempt to proceed." In *Horton v. Ipswich*, 12 Cush. 488, it was held that, if a party knew that a road was obstructed, but not so as to indicate to him that he could not pass it with safety, and he met with injury while proceeding with due care, he might recover.

The petition for a rehearing is overruled.

 Stayner v. Knowler et al.

No. 8787.

STAYNER v. KNOWLER ET AL.

PROMISSORY NOTE.—*Interest.—Erasure.—Review of Judgment.*—A note payable five years after date had printed therein "with ten per cent. interest after maturity;" "with ten per" had been erased and on the line above was written "payable at six per cent. interest."

Held, that only the rate of interest was changed and not the time interest should begin, viz., after maturity.

Held, also, in an action to review a judgment taken upon the note, with interest from date, that such a judgment was erroneous, and that a complaint to review for such cause was sufficient.

From the Steuben Circuit Court.

R. W. McBride, for appellant.

J. A. Woodhull and W. G. Croxton, for appellees.

FRANKLIN, C.—Appellant commenced this suit to review a judgment in said court rendered against him in favor of appellees, upon a certain promissory note, alleging that there was manifest error apparent upon the face of the proceedings in this, that interest was counted at six per cent. from date of note, instead of from maturity. A demurrer was sustained to the complaint for review.

The only question presented in this court is as to whether the note drew interest from date; if it did, the judgment is admitted to be right; if it did not, the judgment is admitted to be erroneous.

The original note, by agreement, is made a part of the record. The following is a copy of the note, the printed parts being italicized:

"\$500. JACKSON, IND., 2d February, 1872.

"Five years after date I promise to pay to the order of Maliss Noler ~~on order~~, five hundred Dollars.

"Payable at six per cent. interest.

"Value received, without any relief from valuation or appraisal laws, ~~with 10 per~~ cent. interest after maturity.

"WILLIAM P. STAYNER."

Stockton v. Lockwood.

The words "six per cent. interest," written in the blank left for the place of payment, stand in the line above and to the left extending to nearly even with the beginning, in the line below, of the words "with 10 per," which had been erased. The erasure of the printed words "with 10 per," and the writing in above the erasure the words "six per cent. interest," we think, only changed the rate of interest that the note would bear, and did not change the time that the interest should begin to run. And the erasure of the printed words "with 10 per," leaving the remainder of the printed sentence unerased, indicates an intention to leave it standing as a substantial part of the note, to control the time when the interest should begin to run.

The complaint in the original cause did not ask to reform any mistake in the note, and it must, therefore, be construed upon its face as it reads.

The court below erred in sustaining the demurrer to the complaint to review, for which error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things reversed, at appellees' costs, and that the cause be remanded with instructions to the court below to overrule the demurrer to the complaint to review, and for further proceedings.

No. 7525.

STOCKTON v. LOCKWOOD.

SUPREME COURT.—*Brief.*—*Waiver.*—All questions raised by a motion for a new trial, but not discussed by the appellant in his brief, are regarded as waived.

ACTION TO QUIET TITLE.—*Injunction.*—*New Trial.*—*Evidence.*—In an action to quiet title and to obtain an injunction to restrain the defendant from injuring the property, the defendant is not entitled to a new trial merely because there was no evidence of the threatened injury.

82	153
146	634
82	153
155	426

Stockton v. Lockwood.

SAME.—Complaint.—Practice.—Where the complaint states facts which entitle the plaintiff to a judgment quieting his title, the suit may be regarded as an action to quiet title, and if the complaint is answered, such relief may be granted, though the complaint contains no such prayer.

From the Carroll Circuit Court.

L. B. Sims, R. P. Davidson, J. C. Davidson and D. P. Baldwin, for appellant.

J. A. Wilstach and J. W. Wilstach, for appellee.

BEST, C.—The appellee brought this suit against the appellant, alleging in her complaint substantially the following facts, viz.: That she is the owner in fee simple of the south half of a certain quarter section of land therein described; that, on the north line of said land, there is a fence of the value of \$160; that she has been the owner and in the actual possession of said land, including the portion upon which said fence stands, under claim of title, for more than twenty-five years; that there is situated upon said land, near the north line of the same, and has been for more than twenty-one years, a one-story frame house of the value of \$500; that said land is enclosed, used for pasture, and is of the annual rental value of \$100; that defendant owns the north half of said quarter section, and, in November, 1873, pretended to claim the land on which said fence and house stand, falsely pretending that the north line of the south half of said quarter is just south of the middle of said house; but that said claim is unfounded, and in conflict with the title and with the actual, continued, peaceable and adverse possession which the appellee has had for more than twenty years before such pretended claim was made. It was further averred that said dwelling-house was in the actual possession of the appellee, and that appellant, on the 17th day of March, 1874, without right, entered into said house, removed one outer door, one inner door, and three windows, thus rendering the house wholly untenable, and preventing the appellee or her tenants from occupying it. The complaint then proceeds thus: "The plaintiff further says that said defendant threatens to and is about

Stockton v. Lockwood.

to remove said fence and thus open the said lands of the plaintiff, and expose the same to cattle and other stock, and ruin and destroy said pasture and prevent the plaintiff from using the same for pasture or other purposes. The plaintiff further says that she intends immediately to repair said house, but said defendant threatens to and will, unless enjoined by the court, continue to dismantle said house and render and keep it in an untenable condition, and will, unless enjoined by this court, remove said fence and expose her said lands to the ravages of stock, and will do her irreparable injury. The plaintiff further shows that this is a case of emergency, and that, if notice is given the defendant, he will, before an injunction can be obtained, further injure said dwelling-house, and will remove said fence.

"The plaintiff prays that the defendant may be enjoined and restrained from injuring or interfering with, molesting or disturbing said dwelling-house, or removing or interfering with said fence; and that a judgment may be rendered for \$500 damages in her favor and against the defendant for the injuries already done, and for all other proper relief."

This complaint was verified and filed on the 19th of March, 1874. An undertaking was filed and a restraining order issued, with notice that an application for an injunction would be made on the 1st of April, 1874. At that time, upon proof of notice and the failure of the defendant to appear, an injunction issued, and was to continue till the final hearing. Afterward the defendant appeared, and filed an answer of five paragraphs. The first was a general denial, and the others were special.

The second averred that within twenty years after the plaintiff took possession of the premises in dispute, the boundary line between their respective lands was established according to law, south of the said dwelling-house, and that said house and the fence were on the land of the defendant; that the doors and windows of said house had been restored without

Stockton v. Lockwood.

injury, and that the defendant had not threatened, nor did he intend to injure said house or fence.

The third averred that said house and fence were upon the north half of said quarter section, and that the plaintiff, before she had occupied said premises twenty years, had abandoned the possession of them.

The fourth and fifth averred that the plaintiff did not take possession of said premises in good faith, nor did she occupy them under color of title, continuously for twenty years.

A reply in denial was filed. The issues thus formed were submitted to a jury for trial, and a general verdict returned for the appellee, assessing her damages at one dollar.

Upon this verdict, over the motion of appellant for a new trial, the court rendered a judgment, perpetually enjoining appellant from injuring, molesting or disturbing the dwelling-house, or from removing or interfering with the fence upon the land in dispute, for the damages assessed, and for all costs.

From this judgment the appellant appeals, and assigns as error the order of the court in overruling his motion for a new trial.

Various causes were embraced in the motion for a new trial, but, as none of them are discussed in appellant's brief except that the evidence was not sufficient to support the verdict, the others will not be noticed. It is stated in the brief filed, that the causes for a new trial, based upon giving and refusing to give instructions, are not waived, and that a brief will be filed discussing these alleged errors, but as this brief was filed on the 26th day of July, 1879, and none has since been filed, these causes must be regarded as waived.

The uncontradicted evidence in this case shows that the appellant claimed the strip of land in dispute; that he entered upon it, and removed from the house thereon two doors and three windows, with a view of preventing appellee's tenants from occupying the house; and that within a week thereafter

Stockton v. Lockwood.

he restored the doors and windows, without doing any other injury to the property. There was no evidence that the appellant threatened to injure the property or remove any part of it.

The appellant insists that this was an action to obtain an injunction to prohibit a threatened injury to property, and as there was no proof whatever of such threatened injury, his motion for a new trial should have been sustained.

This position would be unanswerable if the complaint stated no facts which entitled the appellee to any other relief. It was not, however, thus limited, but averred such facts as entitled the appellee to a judgment quieting her title to the land in dispute. The complaint averred that the appellee was the owner in fee simple and had been in possession for more than twenty years; that appellant a short time before the suit was commenced had asserted an unfounded claim to the land, and in the assertion of such claim, on the 17th of March, 1874, had entered upon the same and carried away the doors and windows of the house thereon. These averments are sufficient to show that appellant's claim is adverse to the appellee's.

In *Dumont v. Dufore*, 27 Ind. 263, the court said: "It is said in argument that the complaint is bad, because there is no averment that the defendant's claim of title is adverse to the plaintiff. This point is not much pressed, and we do not perceive that there is anything in it. The complaint alleges that the plaintiff is seized in fee simple, and is in possession of the real estate, and that the defendant asserts an unfounded claim of title, and interest in the same property. A title in fee simple means a title to the whole of the thing absolutely, and it seems to us that any claim of title to the same thing by another is necessarily adverse to him who owns the whole fee, in the sense of the statute."

The complaint not only averred that the appellee was the owner in fee simple and in possession, but averred such facts

Rahm *et al.* v. Butterfield, Receiver.

as showed that the appellant's claim was adverse to the appellee's, and was sufficient to authorize such relief. This relief was not demanded, but as the purpose of the suit was to determine the title to this strip of land; and as the complaint was answered, the appellee was entitled to any relief consistent with the case made by the complaint and embraced within the issue. *Hunter v. McCoy*, 14 Ind. 528; *Mandlove v. Lewis*, 9 Ind. 194.

Having reached the conclusion that the complaint averred facts which entitled the appellee, upon proof of them, to a judgment quieting her title, the suit may be regarded as an action to quiet title, and, thus regarded, the evidence fully supported the verdict. The court did not err in overruling the motion for a new trial, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Opinion filed at November term, 1881.

Petition for a rehearing overruled at May term, 1882.

No. 8937.

RAHM ET AL. v. BUTTERFIELD, RECEIVER.

SHERIFF'S SALE.—*Partnership.*—*Mortgage.*—*Equity of Redemption.*—G., a member of a firm of partners, mortgaged to the firm real estate to secure a note for \$700, specified in the mortgage as being "held as a reserve fund." A receiver of the firm brought suit to foreclose, alleging that the assets of the firm were exhausted, and that its unpaid liabilities were \$5,000. Answer, that the mortgage was made to the firm to indemnify it against the failure of G. to pay his share of the liabilities of the firm; that all such liabilities are to other members of the firm; that the defendants are purchasers of the land at sheriff's sale, upon a judgment against the firm for a firm debt.

Rahm *et al.* v. Butterfield, Receiver.

Held, that the answer was bad on demurrer, and that the sale by the sheriff was only of the equity of redemption, and did not discharge the mortgage. Woods, J., dissents.

SAME.—Execution.—Lien of Mortgage.—A sheriff's sale on an ordinary execution of real estate owned by one of several joint judgment debtors, upon an execution against all, will not divest a mortgage lien of one of them upon the land.

From the Vanderburgh Circuit Court.

C. Denby and *D. B. Kumler*, for appellants.

A. Gilchrist and *S. R. Hornbrook*, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that he was duly appointed receiver of the partnership assets and affairs of the firm of Craven, Schenck & Co., of which Ezra J. Gerard was a member; that he was clothed with all the ordinary authority of a receiver, and was also invested with authority to sue; that among the partnership assets which came to his hands were a note and mortgage executed by Ezra J. Gerard and wife to Craven, Schenck & Co.; that the note and mortgage are in the usual form, except that the latter, after describing the note, provides that said note is payable to the firm of Craven, Schenck & Co., "and held as a reserve fund"; that the assets of the partnership are entirely exhausted; that the liabilities are \$5,000; that the amount due the firm from Gerard is \$700; that the appellants Rahm and Rahm claim some interest in the land, and are made parties to answer as to their interest.

The third paragraph of the answer of Rahm and Rahm is, in substance, as follows: That the note and mortgage were executed to the partnership for the purpose of indemnifying it from loss by the failure of Gerard to pay his share of the liabilities of the firm; that the note was to be treated as an asset only in case it was necessary to collect it, for the purpose of securing from Gerard his share of partnership liabilities; that there were no debts due by the firm to any person except members; that if any recovery is had, it will go to pay Schenck, one of the partners; that judgments were recovered against

Rahm et al. v. Butterfield, Receiver.

the partners for a firm debt; that, on these judgments, executions were issued and levied on the land described in the mortgage; that sale was made thereon, and the land purchased by the appellants, and that they have received a deed from the sheriff.

We think the court did right in sustaining the demurrer to this answer. The appellants named may have purchased Gerard's equity of redemption, but they purchased nothing more, for nothing more was sold, or could have been sold, upon the execution. The sale on the execution conveyed only the debtor's interest in the land; it did not discharge the mortgage. A sale upon execution can not operate as a discharge of a mortgage, although the mortgage may be held by one of the execution debtors. All that is subject to sale in such a case is the equity of redemption of the debtor whose land is sold and who executed the mortgage.

A judgment is not a lien upon a mortgagee's interest in land, nor can such an interest be destroyed by a sale of the land upon execution. Whether the interest of the mortgagor, who is also an execution debtor, can be reached by proper proceedings, is not here the question. The question is: Does an ordinary sheriff's sale of land owned by one of several joint debtors, upon an execution against all, divest the mortgage lien of one of them? It is clear to our minds that the sale of real estate upon an ordinary execution, can not, in such a case, destroy the mortgage lien.

In holding, as we do, that the sale upon execution did not impair the lien of the mortgage, we dispose of all the subordinate and incidental questions discussed by counsel.

Judgment affirmed.

WOODS, J., dissents.

Downs v. Opp, Administrator.

89	166
135	450

No. 8111.

DOWNS v. OPP, ADMINISTRATOR.

REAL ESTATE, ACTION TO RECOVER.—Complaint.—Descriptio Personæ.—Demurrer.—Administrator.—In the caption of a complaint in ejectment, giving the title of the cause, the plaintiff was described as “administrator of the estate of R., deceased,” but it was averred in the body of it that the plaintiff was the owner and entitled to possession of the land, without any statement that he claimed as administrator, or that the estate of the intestate had any interest in it.

Held, that the words in the caption must be regarded as *descriptio personæ*, and that a demurrer to the complaint did not present any question as to the right of the administrator to recover possession of lands of the estate.

BILL OF EXCEPTIONS.—Appeal.—Question Reserved.—Evidence.—Presumption.—When an appeal is taken according to section 630, R. S. 1881, upon a bill of exceptions only, and the question reserved is upon the exclusion of the defendant’s evidence, the bill of exceptions should show enough of the case to develop the relevancy of the evidence rejected; else it will be presumed that it was not relevant.

From the Tippecanoe Circuit Court.

J. A. Wilstach and J. W. Wilstach, for appellant.

G. O. Behm, A. O. Behm and J. Park, for appellee.

NEWCOMB, C.—This was an action by the appellee to recover a tract of forty acres of land. A demurrer to the complaint was overruled, and this is assigned for error.

The argument of the appellant against the sufficiency of the complaint is thus stated: “The complaint is ejectment by an administrator, without any averment as to the absence of heirs. It is not disputed that in the collection of notes and accounts the designation as administrator copied from the cause of action is *descriptio personæ*, which may be disregarded. But here he makes a part of his complaint the statement that he is administrator, and that as such he claims control of the land.” Counsel for appellant are at fault in their statement of the complaint. True, in the caption, giving the names of the parties, the plaintiff is described as “Adm’r of the estate of Peter Randles, dec.,” but in the body of the

Downs v. Opp, Administrator.

complaint there is no statement that he claims title as administrator, nor that the estate of Peter Randles is in any way interested in the land. The complaint is in the usual form, and avers that the plaintiff is the owner and entitled to the possession of the land described. There is no statement of the source of his title or claim. We conclude, therefore, that the recital in the caption is merely *descriptio personæ*, and that the question of the right of an administrator to maintain an action for the recovery of land belonging to the estate of his decedent is not presented by the complaint and demurrer. The demurrer was correctly overruled.

When the cause was called for trial the defendant moved for a continuance, and in support of the motion presented his affidavit, stating that Benjamin Randles, resident in the State of Kansas, was a material witness for him, and showing sufficient diligence in his efforts to procure the testimony of said witness. The facts expected to be elicited by an examination of the absent witness were stated as follows: "That said Benjamin Randles is one of the heirs of Peter Randles, deceased, and that as such heir he is entitled to a distributive share of the estate of said decedent, to an amount, as this affiant is informed and believes, of at least one thousand dollars; that his, said Benjamin Randles', indebtedness to said estate (besides a mortgage debt provided for and now cancelled by the sale of eighty acres of said Benjamin Randles' lands) was in the form of two promissory notes aggregating \$550, money advanced to him as such heir by said decedent; that said John Opp, not disclosing the fact that such distributive share would be coming to said Benjamin Randles, put said promissory notes in suit, and on the 21st day of September, 1875, obtained judgment thereon in this court for \$649.45; and, in taking said judgment, said Opp agreed with said Benjamin Randles that he would set off said judgment against his said distributive share, but not regarding his said agreement, but in fraudulent violation thereof, obtained on the 13th day of October, 1877, an *ex parte* order of this court that he, said

Downs v. Opp, Administrator.

Opp, as administrator, might bid in said forty acres and hold the same as trustee for the heirs of said decedent, and that he did so bid it in and now holds it as such trustee for said heirs and especially for said Benjamin Randles and for this affiant, and that said Opp should have set off against said debt, as put in judgment and execution, the said distributive share of said Benjamin Randles, and left said real estate undisturbed; and further that said Benjamin Randles has a valid claim against the estate of said decedent for work and labor to the amount of about four hundred dollars, besides interest thereon, and this claim he has not filed against the estate, because he has been assured by said administrator that it would be allowed him in the final settlement, without the trouble and expense of filing the same; that under these circumstances the said Benjamin Randles conveyed to, this affiant the said forty acres by deed from said Benjamin Randles and wife, of date August 24th, 1877."

The plaintiff thereupon admitted that the witness, if present, would testify to the facts alleged in the affidavit, and on this admission the motion for a continuance was overruled. This admission entitled the defendant to use the affidavit as evidence on the trial, in case the facts stated were competent evidence. 2 R. S. 1876, p. 164, section 322.

On the trial, and at the proper time, the defendant offered the affidavit in evidence, but the court, on the objection of the plaintiff, as recited in the bill of exceptions, "excluded said affidavit and every part thereof from the consideration of the jury, on the ground, among others, that the said Benjamin Randles was not a party to this suit."

The defendant excepted, reserved the question of law, and notified the trial court that he intended to take the question of law to the Supreme Court on the bill of exceptions only.

There was a verdict for the plaintiff; defendant's motion for a new trial was overruled, and judgment on the verdict.

The additional errors assigned are:

"2. That the court erred in excluding from the considera-

Downs v. Opp, Administrator.

tion of the jury the statements of Benjamin Randles, as set forth in the affidavit for continuance.

"3. The court erred in overruling the motion for a new trial."

This appeal is based on section 347 of the code of practice, which is as follows:

"Either party may reserve any question of law decided by the court, during the progress of the cause, for the decision of the Supreme Court. Any question of law so reserved, may be taken to the Supreme Court upon the bill of exceptions showing the decision; or, if it arises on demurrer, upon the pleadings involved. When the question so reserved is shown by bill of exceptions, the party excepting shall notify the court that he intends to take the question of law to the Supreme Court upon the bill of exceptions only, and the court shall thereupon cause the bill of exceptions to be so made that it will distinctly and briefly embrace so much of the record of the cause only, and the statement of the court, as will enable the Supreme Court to apprehend the particular question involved."

It is provided in section 344, that the objection must be stated with so much of the evidence as is necessary to explain it, and no more.

It was held, in *Starry v. Winning*, 7 Ind. 311, that these two sections must be construed together. The appellant's counsel have presented, ably and at length, the questions they assume to be involved, as follows:

"1. That the judgment of the plaintiff against Benjamin Randles was obtained by fraud, and that the defendant, his grantee, could properly prove that fact as a defence to the action.

"2. That the court having probate jurisdiction was not empowered by section 71 of the act providing for the settlement of decedents' estates—2 R. S. 1876, p. 518—to authorize the administrator to purchase the land in question at sheriff's sale, but that said section has reference to personal property only; wherefore the plaintiff did not acquire title by the sheriff's sale mentioned in the affidavit.

Downs v. Opp, Administrator.

"3. That the issuing of an execution and the purchase of the land thereunder by the plaintiff, after agreeing with Benjamin Randles to set off the judgment against his distributive share of Peter Randles' estate, was such a fraud as vitiated the sale."

On a careful review of the record, we are of the opinion that these questions are not so presented as to justify us in deciding them. There is no statement in the bill of exceptions of the nature of the title under which the plaintiff claimed a recovery, nor that he gave in evidence, or relied at all, upon the alleged sheriff's sale referred to in the affidavit for a continuance. For aught that appears in the record, the plaintiff may have recovered upon a totally different title. It is impossible, therefore, for us to say that the circuit court erred in excluding the affidavit. Among the "other reasons" given by the court below for excluding the affidavit, that of irrelevancy may have been one; and we must presume in favor of the rulings of the trial court, unless they are clearly shown to have been erroneous.

In support of our conclusions, we refer to the following previous rulings of this court in like cases: In *Starry v. Winning*, *supra*, objection was made in the trial court to the evidence of an alleged official survey of land by one Kent, on the ground that his office of county surveyor had terminated before the survey in question, by the provisions of the 10th section of the schedule of the constitution of 1851. In the opinion, STUART, J., said: "As the evidence on this point is not in the record, we do not know but that he might, in *September*, 1852, have held the office by election, or by a subsequent appointment to fill a vacancy. If so, the evidence was properly admitted. True, the record shows some evidence in relation to his appointment as surveyor in 1850. But it nowhere appears that this was all the evidence on that point. For all the record discloses, it might have been shown that he was legally in office at the time of the survey in *September*, 1852. This much we are bound to presume in favor of the action of the court, unless the record affirmatively discloses a different state

Downs v. Opp, Administrator.

of facts. * * We do not propose to lay any stress on his being an officer *de facto*, nor on the admissibility of the evidence for some purposes, independent of its official character. We put it upon the ground that the record must contain, and must purport to contain, all the evidence relating to the point of exception."

In *Mitchell v. Dibble*, 14 Ind. 526, it was held that, when the improper admission of evidence was complained of, the bill of exceptions, under sec. 347 of the code, must state such facts as existed, rendering the admission of the evidence proper or improper.

In *Hedrick v. Hedrick*, 74 Ind. 78, where the point of objection was that the court below excluded competent evidence, BICKNELL, C. C., in considering what is necessary to be shown in a bill of exceptions in a case reserved under sec. 347, said: "In the case now before us, the bill of exceptions does not contain, or purport to contain, any of the evidence given in the cause. In the absence of any evidence relating to the points of exception, we are bound to presume that the evidence, if present, would sustain the rulings of the court and the overruling of the motion for a new trial."

In *Bissell v. Wert*, 35 Ind. 54, a judgment was reversed on the ground that erroneous instructions had been given, although the evidence was not in the record; but the bill of exceptions stated that there had been evidence given to the jury tending to prove certain facts to which the instructions were applicable. In the case at bar, however, none of the evidence is in the record, nor is there any statement in the bill of exceptions that evidence was introduced to which the excluded testimony could have been applicable or relevant.

For the reasons above given, the judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and it is hereby in all things affirmed, at the costs of the appellant.

Opinion filed at the May term, 1881.

Petition for a rehearing overruled at the May term, 1882.

Mathesie v. Board of Commissioners of Knox County.

No. 10,145.

MATHESIE v. BOARD OF COMMISSIONERS OF KNOX COUNTY.

STATUTE OF LIMITATIONS.—*Board of County Commissioners.*—*County Treasurer.*—The statutory bar of six years operates upon the claim of a county treasurer made before a board of county commissioners for fees for the collection of delinquent taxes due him and not allowed at the proper time of settlement.

From the Knox Circuit Court.

O. F. Baker, for appellant.

C. M. Wetzel, for appellee.

NIBLACK, J.—At the March term, 1881, of the board of commissioners of Knox county, Charles G. Mathesie, a former county treasurer, filed a claim against that county for an additional compensation for the collection of certain delinquent taxes collected by him during his term of office.

The board refused to allow his claim, and he appealed to the circuit court, where the commissioners answered, among other things, the six years' statute of limitations, and where a special finding of the facts was made as follows:

"1. That the plaintiff was the treasurer of Knox county from the 11th day of November, 1870, to the 11th day of November, 1874.

"2. That the plaintiff, as such treasurer, between the 8th day of March, 1873, and the third Monday in April, of that year, collected of the delinquent taxes extended on the tax duplicate then in his hands, the sum of ten thousand dollars, all of which was paid voluntarily and without levy or sale, by the persons owing such taxes.

"3. That on the 15th day of May, 1873, the plaintiff, as such treasurer, settled with the auditor of Knox county for the current and delinquent taxes charged on said duplicate, and the whole amount of taxes collected upon such duplicate up to the third Monday in April, 1873, including the sum of ten thousand dollars of delinquent taxes collected by him as

Mathesie v. Board of Commissioners of Knox County.

above stated, and upon such settlement he charged and retained as his fees, for the collection of said delinquent taxes, a commission of one per cent., amounting to the aggregate sum of one hundred dollars, and no more, and thereafter duly accounted for and paid over the residue of said delinquent taxes.

"4. That the plaintiff, as such treasurer, on the 15th day of December, 1873, received from the auditor of Knox county the tax duplicate of said county for the year 1873, and between that day and the third Monday in April, 1874, collected of the delinquent taxes charged on said duplicate the sum of eight thousand six hundred and twenty-nine dollars and four cents, all of which was paid voluntarily and without levy or sale by the persons owing such taxes.

"5. That on the 15th day of May, 1874, the plaintiff, as such treasurer, made a settlement with the auditor on account of taxes, current and delinquent, charged on the tax duplicate for the year 1873, and the whole amount of taxes collected upon said duplicate up to the third Monday in April, 1874, including the delinquent taxes collected as lastly above stated, and upon such settlement charged and retained for his fees for collecting said delinquent taxes a commission of one per cent., amounting in all to the sum of eighty-six dollars and twenty-nine cents, and no more, and thereafter accounted for and paid over the residue of such delinquent taxes.

"6. That a commission of one per cent., as herein above stated, is all the compensation which the plaintiff has ever, either directly or indirectly, received for collecting and paying over said delinquent taxes during the years 1873 and 1874.

"7. That this action was commenced on the 7th day of March, 1881, by the filing of a claim by the plaintiff with and before the board of commissioners of Knox county, for an additional sum of four per cent. for collecting such delinquent taxes."

Upon these facts the court reached the following legal conclusions:

"1. That, under the act for the assessment and collection of

Mathesie v. Board of Commissioners of Knox County.

taxes, approved December 21st, 1872, and an act fixing the fees of county treasurers, approved March 8th, 1873, the plaintiff, as such treasurer of Knox county, became and was entitled to charge and receive a commission of five per cent. on all the delinquent taxes collected and accounted for by him during the years of 1873 and 1874, as hereinabove stated.

"2. That the plaintiff's right to recover the additional four per cent., not retained by him out of the said delinquent taxes so collected by him, was wholly barred by that clause of the statute of limitations not permitting certain actions to be maintained after the expiration of six years.

"3. That, consequently, the plaintiff was not entitled to recover in this action."

The court thereupon rendered final judgment for the defendant. The plaintiff has appealed and assigned error upon the second and third conclusions of law arrived at as above by the court.

The appellant argues that the claim filed in this case was, in legal contemplation, but an application under sections 177, 178 and 179 of the act of December 21st, 1872, *supra*, 1 R. S. 1876, p. 116, for the refunding of money erroneously accounted for and paid over by him while treasurer, and hence a special proceeding to which the statute of limitations could not be properly pleaded.

We are unable to adopt the construction for which the appellant thus contends.

The claim in this case was simply a claim for services rendered the county in the collection of certain taxes for which the appellant did not receive full compensation at his annual settlements in the years 1873 and 1874 respectively, and the proceedings had upon it, both before the commissioners and in the circuit court, had all the essential characteristics of an ordinary action at law.

We are, therefore, unable to recall anything, whether resting on principle or recognized in practice, which would justify

Loeb v. The City of Attica.

us in holding that the statute of limitations was not well pleaded in this case.

As at present advised, we know of no reason why the statute of limitations might not be pleaded in bar of an application for the refunding of money erroneously paid over and accounted for by county treasurers, when made under sections 177 and 178, *supra*.

With these views as to the law governing this case, the judgment below will have to be affirmed.

The judgment below is affirmed, with costs.

No. 9130.

LOEB v. THE CITY OF ATTICA.

CITY.—Power to Prohibit Sale of Intoxicating Liquor on Sunday.—A city, organized under the general law for the incorporation of cities, has no power to pass an ordinance prohibiting the sale of intoxicating liquors within the city on the Sabbath day.

From the Fountain Circuit Court.

J. McCabe and *C. M. McCabe*, for appellant.

M. Milford, for appellee.

BEST, C.—On the 11th day of August, 1880, this action was brought by the appellee against the appellant to recover a penalty for the violation of an ordinance prohibiting the sale of intoxicating liquors within the city on the Sabbath day.

Before the mayor the appellee recovered, and upon appeal the appellant moved to dismiss the case because the city had no power to pass the ordinance. This motion was overruled; the cause was tried by the court and final judgment rendered against the appellant.

The only question on this appeal is whether the city possessed the power to pass the ordinance.

Loeb v. The City of Attica.

As nothing appears to the contrary it will be presumed that the city of Attica was incorporated under the general law for the incorporation of cities. *Lowrey v. City of Delphi*, 55 Ind. 250; *Bessonies v. City of Indianapolis*, 71 Ind. 189.

The general law for the incorporation of cities provides that the common council shall have power to enforce ordinances "To regulate and license all inns, taverns, or other places used or kept for public entertainments; also all shops, or other places, kept for the sale of articles to be used in, and upon the premises." Thirteenth subdivision of section 53. Section 54 provides that "to exact license money from all persons licensed to retail intoxicating liquors by county or State authority and to regulate all places where intoxicating liquors are sold to be used on the premises, the common council shall have jurisdiction two miles beyond the city limits."

These sections confer the power to require a license to retail within the city, and authorize the common council to regulate all places where intoxicating liquors are sold to be used upon the premises. They do not, however, authorize the common council to regulate places where intoxicating liquors are sold not to be used upon the premises, nor to regulate places where they are not sold unless other articles are sold to be used upon the premises. The power conferred is limited. These sections do not confer the power to prohibit the sale of intoxicating liquors within the city, nor to regulate the places where such liquors are sold, except the places where they are sold to be used upon the premises. There is no power to regulate other places where they are sold, nor to prohibit the sale of them generally in the city. The ordinance in question does not purport to regulate any place where intoxicating liquors are sold to be used upon the premises, but prohibits the sale absolutely at all places within the city on the Sabbath day. This ordinance is manifestly not within the power conferred by these sections.

It is also insisted that the seventh subdivision of section 53, which provides, that the common council shall have power

Loeb v. The City of Attica.

"To preserve peace and good order, prevent vice and immorality, and quell riots and disorderly assemblages," confers the power to pass the ordinance in question. If the power to regulate places where intoxicating liquors are sold to be used upon the premises had not been expressly conferred, and the Legislature had not undertaken to prohibit sales of intoxicating liquors at all places within the State on the Sabbath day, there would be much force in this position, but as the power to regulate certain places where intoxicating liquors are sold has been expressly conferred, and the Legislature has enacted general laws upon this subject, we can not think that the power to adopt the ordinance in question has been conferred by implication.

It is said in Dillon Municipal Corporations, 2d ed., section 298, that "Where there are general laws of the State respecting the sale of intoxicating liquors, a public corporation, by virtue of a general power 'to make all by-laws that may be necessary to preserve the peace, good order, and internal police' therein, is not authorized to pass an ordinance requiring a corporate license, and punishing persons who sell such liquors without being thus licensed."

If cities, under such power, where general laws are in force upon the subject, have no authority to require a license, or to punish for selling liquors without a license, it must follow that they have no power to prohibit the sale of such liquors, or to punish persons who sell them in violation of such ordinances.

The appellee refers us to the case of *Megowan v. Commonwealth*, 2 Met. (Ky.) page 3, where a similar ordinance was sustained. The cases are unlike. The Legislature of Kentucky conferred the power upon the cities to pass all ordinances for its government not inconsistent with the constitution of the State or of the United States. Under this power, which was ample, the ordinance was passed and sustained.

We have been referred to no other law, and know of none, that confers the authority, and, therefore, think the city pos-

Hays v. The City of Vincennes.

sessed no power to pass the ordinance in question, and that the court erred in overruling the appellant's motion to dismiss the case.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to sustain the appellant's motion to dismiss the case.

No. 8750.

HAYS v. THE CITY OF VINCENNES.

89 178
150 150

CITIES.—*Opening Streets.—Appeal.—Statute Construed.*—The act of March 17th, 1875, 1 R. S. 1876, p. 318, in relation to laying out streets, etc., is amendatory and supplemental to chapter 12 of the general law concerning cities, of March 14th, 1867, 1 R. S. 1876, p. 267, and proceedings on appeal from the opening of streets are regulated by the former act.

SAME.—*Record.—Demurrer.*—In a proceeding, under the act of March 17th, 1875, 1 R. S. 1876, p. 318, for widening a street, a demurrer to the transcript, for want of sufficient facts, is not permissible on appeal, but the specific grounds of objection, if apparent on the face of the record, must be stated in the demurrer, and matters of fact not so apparent must be pleaded.

SAME.—*Description of Street by Course and Distance.*—It is not necessary that the resolution of the common council of a city for the widening of an existing street describe the street by course and distance, or state "of what it consists" or "from whom or whence taken." It is enough if the location and extent of the proposed change be well stated.

SAME.—*Report of Commissioners.—Description of Property.—Names of Owners.*—In such proceeding, the report of the city commissioners must be certain and definite in respect to the names of owners and value and description of property taken as well as of that upon which damages or benefits have been assessed. "The remainder" of a lot from which a specified part has been taken, is a good description.

SAME.—*Order of Appropriation.*—An order of the common council for the appropriation of a strip thirty-one feet wide, from the south side of a lot next to the street to be widened, "so as to make the said street fifty feet in width," is not indefinite.

SUPREME COURT.—*Evidence.—Practice.*—On appeal to the Supreme Court, no objection to the admission of evidence can be urged, which was not made in the court below.

Hays v. The City of Vincennes.

NEW TRIAL.—*Motion for.*—*Evidence.*—*Objection to.*—*Waiver.*—*Practice.*—

No objection to the admission of evidence, which was not suggested when the evidence was offered, can be made available as a cause for a new trial, either in the court below or on appeal, and the statement of such objection in the motion for a new trial constitutes a waiver of other objections not stated in the motion, although properly suggested to the court when the evidence was offered.

BILL OF EXCEPTIONS.—*Statement of Testimony.*—It is not proper to state in a bill of exceptions, made for the purpose of showing the evidence, what was *proven* by a witness. His testimony should be given as delivered, as nearly as practicable.

From the Knox Circuit Court.

W. F. Pidgeon, for appellant.

H. S. Cauthorn and *J. M. Boyle*, for appellee.

WOODS, J.—Proceedings under the act of March 17th, 1875, 1 R. S. 1876, p. 318, for the purpose of opening and widening Tecumseh street, in the city of Vincennes. The appellant here, who was also the appellant in the circuit court, has assigned error upon the overruling of his demurrer to the complaint; that is to say, to the transcript of the proceedings of the city council in the matter, which, on appeal, is treated as the complaint, upon the overruling of his motion for a new trial, and upon the judgment against him for costs.

The demurrer filed by the appellant is for the general reason that the complaint does not state facts sufficient, appended to which is a specific statement of two objections, namely: *First.* That the resolution of the common council for the making of the appropriation, "does not describe Tecumseh street, of what it consists, from whom and from whence taken, its beginning, course, distance and termination, nor does it show that any such street has ever been laid out of any definite width or length, its course or distance, nor the names of owners of the land of which said Tecumseh street is to be made, but is uncertain, indefinite and invalid. *Second.* That the commissioners do not describe and value that portion of lot 1 in Allen's addition to the city of Vincennes appropriated,

Hays v. The City of Vincennes.

and the remainder not appropriated, specifying the same in parcels with the names of the owners, as in sec. 63 provided."

The appellant excepted to the overruling of this demurrer, and, by leave of the court, filed an answer in two paragraphs, the first being to the effect that Tecumseh street, so called, was not a public street, but private property, and the second a claim for damages on account of the proposed widening; upon which answers the appellee joined issue of fact, which was tried by the court, resulting in a finding and judgment, whereby the proceedings of the city council were in all things sustained.

The practice in cases of appeal from such proceedings is defined by the provisions of the act referred to, which must be regarded as amendatory of and supplemental to the provisions of chapter 12 of the general law of cities, approved March 14th, 1867. 1 R. S. 1876, p. 267.

The following provisions are relevant here:

"Sec. 14. If any person having an interest in the lands, affected by such proceedings, shall deem himself aggrieved thereby, he may appeal. * * * Upon such appeal may be tried the regularity of the proceedings of the commissioners, and the questions as to the amount of benefits or damages assessed. * * The city clerk shall * * make a transcript, of the proceedings. * * * After filing of the said transcript, * * * the appellant shall, in writing, state specifically the grounds of his objection to the proceedings of the common council and commissioners, and [no] other questions shall be tried or heard, except such as are with certainty to a common intent presented by the aforesaid written statement filed by such appellant. * * The transcript of the proceedings of the common council and commissioners shall be considered as the complaint, and the written statement to be filed by the appellant, as aforesaid, shall be in the nature of an answer or demurrer. Issues of law and of fact may be formed, tried and determined as in other actions at law. The question as to whether notice was

Hays v. The City of Vincennes.

given others, or as to whether proper assessments were made in favor of or against persons other than the appellant, shall not be tried, nor shall any question be tried which does not directly affect the property or right of the person or persons, who take the appeal as aforesaid."

It is evident from these provisions that a demurrer for the general cause that the complaint does not state facts sufficient is not permissible, but the specific grounds of objection to the proceedings must be stated in the demurrer, if apparent on the face of the transcript, and if they consist of matters of fact not apparent in the record, they must be specially pleaded.

So far, therefore, as the brief of the appellant, under the ruling upon the demurrer, has touched upon matters not specifically stated in the demurrer, it must be deemed irrelevant. As to the particular objections stated they are not, so far as material, true in fact. Both in the original and in the amended resolution of the common council, the position of Tecumseh street, if a mere reference to it by name would not have been enough, was sufficiently defined as being "on the line between Upper Prairie Survey, Nos. 7 and 8, being also between Judah's addition and McCord's and Smith's addition to said city on the southwest, and Allen's addition, Ellis' addition to said city, part of Upper Prairie Survey, No. 8, on the northeast, * * from St. Louis street to the Indianapolis road, a distance of 289 feet;" and the property of the appellant which it was proposed to appropriate was well described as "a strip of ground, thirty-one feet in width, the entire length, off the southwest side of lot No. 1, in Allen's addition to said city, so as to make the said street fifty feet in width."

There is nothing in the law which expressly or by fair implication requires that the resolution of the common council should specifically describe, by course and distance, the street which it is proposed to vacate, or alter by widening or otherwise, or to state "of what it consists" or "from whom or

Hays v. The City of Vincennes.

whence taken." If in such case the location and extent of the proposed change are well stated, it would seem to be enough in this respect. If it was a proposition to open a new street entirely, its location of course ought to be specifically defined.

As to the names of owners, the value and description of the property taken, as well as that upon which damages or benefits are assessed, the law requires the report of the commissioners to be definite and certain; and such was their report in this instance, which described said lot No. 1, in Allen's addition to the city, as belonging to the appellant, naming him; assessed the value of the portion taken which is described; and to "the remainder" of the lot reported a benefit in a sum named. "The remainder" of a lot from which a specified portion has been taken, is a good enough description.

It is argued that because the width and exact location of Tecumseh street are not stated in the proceedings, the description of the land appropriated is made uncertain, on account of the phrase, "so as to make the said street fifty feet in width." That phrase, however, constitutes no part of the description of the part of the lot to be appropriated, which is defined as "a strip of ground thirty-one feet in width," etc. That much and no more nor less was appropriated. The purpose was thereby to make the street fifty feet wide, but whether that should be accomplished was not of the essence of the procedure, and could not affect its validity or certainty.

One of the reasons for a new trial is the alleged error of the court in admitting a certain map or plat of the city of Vincennes, over the objection of the appellant, that it was not the original plat of Allen's addition.

The objection made at the time the map was put in evidence was its immateriality, and that Tecumseh street did not appear on it. The appellant can urge upon appeal only such objections as were made in the court below. *Bruker v. Kelsey*, 72 Ind. 51.

 Williams v. Kessler.

It would, doubtless, have been sufficient in the motion for a new trial to have specified the admission of the evidence as the irregularity complained of, without specifying the grounds of objection, and this would have required the court to reconsider such objections as were properly made at the time of the ruling; but, by stating in his motion for a new trial a particular ground of objection, the appellant waived all others, and the one stated, not having been made at the proper time, is not available. We may add that under act of December 27th, 1872, 1 R. S. 1876, p. 346, the evidence seems to have been competent.

The admission of oral testimony tending to show the existence of Tecumseh street by user is also made a cause for a new trial, but the record fails to show any objection to the introduction of this evidence, and consequently no question is presented.

It is doubtful whether the bill of exceptions is a proper one to show the evidence in the case. Instead of professing to state the testimony of the witnesses, it says: "The plaintiff introduced A. B. as a witness, and proved by him that," etc., and so of most of the witnesses examined in the case. It is proper to certify in a bill what was the testimony of a witness, but not to state, unless by agreement of the parties, what was proven.

We find no error in the record.

Judgment affirmed, with costs.

 No. 8267.

WILLIAMS v. KESSLER.

REPLEVIN.—*Judgment of Return of Property.—Pleading.—Practice.*—A cross complaint or answer specially praying a return of the property to the defendant, in an action of replevin, is not necessary to entitle him to judgment for such return, the general denial being enough.

89	183
125	435
82	183
150	455

Williams v. Kessler.

SAME.—Default.—Affidavit to Set Aside.—The affidavit of a plaintiff in replevin to set aside a default and judgment against him rendered thereon, is insufficient if it do not show the nature of his cause of action. A general statement, that "he has a good cause of action, and believes he will recover judgment," is insufficient, and the court can not, on motion to set aside the default, take notice of the affidavit for the writ.

SAME.—Excusable Neglect.—A railroad accident caused the loss of a day to a party *en route* to court, notwithstanding which he could have reached the place in time for trial, but for the fact that he stopped to get a necessary witness, with whom he had arranged to meet his train of the day before and go with him, and who had met that train, and by reason of the delay he was defaulted, and judgment rendered against him.

Held, that his neglect was not excusable.

From the Noble Circuit Court.

J. S. Frazer and *R. B. Encell*, for appellant.

A. A. Chapin, for appellee.

NEWCOMB, C.—The appellant was plaintiff, and the appellee defendant, in an action of replevin in the Noble Circuit Court. The defendant answered by a general denial, to which was added a prayer for a return of the property, or the value thereof in case a return could not be had, and damages for its detention, etc. The cause was called for trial on October 23d, 1878, and, the plaintiff being absent, his attorney withdrew from the case. Thereupon, on defendant's motion, the court defaulted the plaintiff, dismissed his action, and proceeded to try the cause upon the defendant's answer and claim for a return, etc., of the property. The result was a finding of the value of the property, that the defendant was the owner and entitled to the possession of the same and to recover \$50 damages. This was followed by a judgment for a return, etc., or in case a return could not be had that the defendant recover the value of the property as found by the court, together with his damages.

On the next day the plaintiff appeared in court and filed a motion, supported by the affidavits of himself and counsel, to set aside the default and judgment. This motion was overruled and the plaintiff excepted.

Williams v. Kessler.

Two errors are assigned :

" 1. That on the answer filed the court had no authority to proceed with the cause and make a finding and render a judgment in defendant's favor, after the dismissal of the plaintiff's action.

" 2. That the court ought to have sustained the motion to set aside said default and judgment."

The solution of the first question depends on the proper construction of section 2 of the act of March 5th, 1877, amendatory of sections 132 and 374 of the code of practice. We quote so much of section 2 as bears upon the case: "Where the property has been delivered to the plaintiff, and the defendant claims a return thereof, or if the plaintiff dismisses his action, or if he fails to prosecute the same, and the cause is dismissed, judgment for the defendant may be for the return of the property, or its value in case a return can not be had, and damages for the taking and withholding the property." Acts 1877, p. 102.

The ground assumed by appellant is, that to entitle the defendant in such an action to proceed, under the act of 1877, after the plaintiff's action is dismissed, he must have on file a special answer or counter-claim setting forth all the particulars necessary to be averred in a cross action.

We do not think the statute should be thus limited in its operation. Its evident purpose is to prevent advantage from being taken of defendants by abandoning or dismissing such actions after the property has been obtained by the writ, and to give defendants the same rights and remedies where the plaintiff disappears from the case, as where he proceeds to a trial. The general denial, in actions for the recovery of personal property, not only puts the plaintiff to the proof of the allegations of his complaint, but under it the defendant may prove property in himself, or a stranger, because, in this action, the plaintiff must succeed on the strength of his own title, and not the weakness of his adversary's; therefore, any evidence tending to show that the plaintiff is not entitled to

Williams v. Kessler.

recover can be given by the defendant under the general denial. *Davis v. Warfield*, 38 Ind. 461; *Darter v. Brown*, 48 Ind. 395; *Wiler v. Manley*, 51 Ind. 169.

Under the practice prior to the code, when special pleas were necessary in replevin, it was held that a plea of property in the defendant, or in a stranger, entitled the defendant to a return of the property, if the finding was in his favor, *Martin v. Ray*, 1 Blackf. 291; *Noble v. Epperly*, 6 Ind. 468.

Under the code, which did not provide for a trial, unless the plaintiff appeared and prosecuted his action, the defendant, in case he claimed a return of the property, and the verdict was in his favor, was entitled to judgment for a return of the property, or its value in the alternative. 2 R. S. 1876, p. 187, section 374. The amendatory statute of 1877 reenacts the same provision, and extends precisely the same remedy to the defendant in case of a dismissal or a failure to prosecute the plaintiff's action. As by the answer on file the defendant was entitled to prove, upon the trial, if the plaintiff had proceeded to a trial, that the property in question was his, and he had prayed for a return thereof, the court did not err in its action subsequent to the default of the plaintiff, in hearing the defendant's evidence and rendering judgment in his favor, if the evidence showed him entitled thereto.

The remaining question is: Did the court err in overruling the motion of appellant to set aside the default and judgment against him?

The substance of the plaintiff's affidavit was, that for three months preceding, he had resided in the State of Kansas, about 1,000 miles from the place where the Noble Circuit Court was held; that, owing to the serious sickness of his wife, he was not able to start for said court until four days prior to the time said cause was dismissed; that he would have reached Albion, however, on Oct. 22d, if he had not been delayed at Kansas City by a failure to make connection with a train for Chicago; that he thereby lost one day; that he left Chicago by rail on Tuesday evening, Oct. 22d, for Warsaw, In-

Williams v. Kessler.

diana, with a view to bringing from Bourbon, Marshall county, Indiana, his son Adelbert Williams, a material witness for him; that he had an arrangement with said witness to meet him on the train at Bourbon on Monday evening, Oct. 21st, and that the witness was at Bourbon on said Monday evening, but failed to meet plaintiff by reason of said delay; that plaintiff arrived at Bourbon at 9 P. M., Oct. 22d, and, failing to find the witness at the station, he stopped off and went to the residence of said witness in said town, and there learned that he had gone seven miles into the country on business; that, early the next morning, he hired a team and went after said witness; that, when he found him, there was not time to reach the train on the Baltimore railroad, the direct route to Albion, and plaintiff was obliged to return to Bourbon and take the less direct route *via* Warsaw; that he arrived at Albion as soon as it was possible for him to reach there under the circumstances stated; and but for the delay at Kansas City, he would have reached Albion on Oct. 22d, the day before he was defaulted.

The affidavit further stated that, before leaving Bourbon, on the morning of Oct. 22d, the plaintiff left in the telegraph office at that place a despatch, to be promptly forwarded to his attorney, as follows:

“BOURBON, IND., Oct. 23d.

“To Lawyer Zimmerman, Albion:

“Accident occurred on train. Will be with you to-day.

“DAVID WILLIAMS.”

The affidavit also alleged that the plaintiff had a good cause of action, and that he believed he was entitled to and would recover judgment as prayed for in his complaint.

The affidavit of Mr. Zimmerman stated that the Bourbon telegram did not reach him until 1 o'clock P. M., Oct. 23d. The record does not show the hour of the day on which the plaintiff was defaulted, nor that his attorney asked for any delay. We infer, therefore, that the telegram was received after the default, as a faithful attorney would not fail, in such

Williams v. Kessler.

a case, to inform the court of the cause of his client's absence, and ask a delay of the trial for a few hours.

The affidavit of the plaintiff did not present a legal cause for the relief asked by his motion. It failed to show that the delay at Kansas City caused him to reach Albion too late for trial on October 23d. On the contrary, it disclosed the fact that if he had proceeded on the train he took at Chicago he would have been at Albion on the morning of the 23d, before the cause was called for trial. The cause of his misfortune was that he spent the greater part of the 23d in travelling through Marshall county in search of a witness who had not been subpoenaed, who was beyond the reach of a subpoena from the Noble Circuit Court, and whose deposition had not been taken. The failure to secure the evidence of the witness was not excusable neglect, and the failure of the appellant to be present when the cause was called for trial was not excusable neglect.

As it appears that the appellant could and might have reached Albion in time for the trial, he ought to have shown at least, that he lost some material testimony in consequence of the absence of the witness Adelbert. His affidavit did not inform the court what facts he could prove by said witness, but merely stated in general terms that he was a material witness. This was not the statement of a fact but of the conclusion of the mind of appellant as to the importance of the witness's testimony.

We can not say that the court erred in overruling appellant's motion, and its judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is hereby in all things affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Appellant, in his petition for a rehearing, insists that the court erred in holding that the affidavit, upon

Williams v. Kessler.

which the motion to set aside the default was made in the court below, was insufficient.

The only allegation contained in the affidavit, in relation to the nature of the cause of action, is the following: "He further says that he has a good cause of action herein, and believes he is entitled to and will recover judgment as prayed for in his complaint in said action."

This, we think, is not sufficient.

In the case of *Goldsberry v. Carter*, 28 Ind. 59, this court held as follows: "The affidavit is defective in not stating the nature of the defence. *Frost et al. v. Dodge et al.*, 15 Ind. 139, and the authorities therein cited. The default can only be set aside to let in a defence to the merits, and the nature of the defence must be shown; it is not enough to state that the defendant believes he has a meritorious defence to the action."

We see no reason why the rule which has been applied to defendants, in relation to the nature of their defences, should not be equally applied to plaintiffs, in relation to the nature of their causes of action.

But it is insisted by appellant that the nature of his cause of action was set forth in his affidavit in the original replevin suit. This may be true, but that affidavit constitutes no part of the affidavit or proceedings to set aside the default, and can not be used in connection therewith, unless it had been referred to and made a part of the latter affidavit, which is in no way attempted to be done. For this omission, we think the affidavit to set aside the default was defective, and the petition for a rehearing should be overruled.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the petition for a rehearing be and the same is overruled.

Board of Commissioners of Pike County v. Norrington.

No. 8586.

BOARD OF COMMISSIONERS OF PIKE COUNTY v. NORRINGTON.

COUNTY BOARDS.—*Building or Repairs of Public Works.*—*Contractor's Bond.*—*Laborers and Material-Men.*—Under sections 4246 and 4247, R. S. 1881, it is the duty of the board of county commissioners to refuse to receive any bid for the building or repairing of any bridge or other county building, unless such bid be accompanied by a good and sufficient bond, payable to the State of Indiana, signed by at least two resident freehold sureties, and guaranteeing the faithful performance and execution of the work bid for, and that, if the bidder receive the contract, the contractor shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished, and for boarding the laborers thereon.

SAME.—*Failure or Neglect to Require Bond.*—*Liability of County.*—If, however, the county commissioners fail or neglect, from any cause, to require of the bidder or contractor any such bond, the county can not be held liable to any third party for any loss or damages, which may be claimed to result from such failure or neglect.

MECHANICS' LIEN.—*County Bridge.*—*Public Policy.*—A county bridge is not a "building," within the meaning of section 5293, R. S. 1881, in relation to the liens of mechanics, laborers or material-men, and public policy forbids either the acquisition or enforcement of any such lien upon or against a county bridge.

From the Pike Circuit Court.

J. H. Miller and E. P. Richardson, for appellant.

E. A. Ely, C. H. Burton, F. B. Posey and J. W. Wilson, for appellee.

Howk, J.—This was a suit by the appellee against the appellant in a complaint of four paragraphs. To each of these paragraphs the appellant demurred, upon the ground that it did not state facts sufficient to constitute a cause of action. These demurrers were sustained to the first, second and fourth paragraphs, and overruled as to the third paragraph, of the complaint. The appellant answered in four paragraphs. Appellee's demurrers for the want of facts were sustained to the first and second paragraphs of answer, and, on his motion, the fourth paragraph was struck out, leaving the cause at is-

Board of Commissioners of Pike County v. Norrington.

sue on the general denial to the third paragraph of the complaint. The cause was tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of \$709.71; and over the appellant's motions for a new trial, and in arrest of judgment, the court rendered judgment on the verdict.

In this court the appellant has assigned as errors the following decisions of the trial court:

1. In overruling its demurrer to the third paragraph of the complaint;
2. In sustaining the demurrer to the first and second paragraphs of its answer;
3. In striking out the fourth paragraph of its answer;
4. In overruling its motion for a new trial; and,
5. In overruling its motion in arrest of judgment.

The appellee has assigned as cross errors the decisions of the circuit court in sustaining the appellant's demurrers to the first, second and fourth paragraphs of his complaint. We will first consider and pass upon the errors assigned by appellant.

1. In the third paragraph of his complaint the appellee alleged, in substance, that on the 9th day of September, 1877, the appellant employed one H. T. Dare to build a bridge across Patoka river, at Winslow, in Pike county, at a point where the Petersburg and Boonville road, a public highway, intersected said river, and agreed to pay therefor the sum of \$3,500; that said Dare built said bridge at the point named; that the appellee, at said Dare's request, from October, 1877, to May 14th, 1878, furnished lumber and re-sawed posts to be used, and which were used, in the construction of said bridge, and were reasonably worth the sum of \$829, which sum was due and unpaid; that the appellant did not, at the time it employed said Dare to build said bridge, or at any other time, require him to execute a bond, payable to the State or to any one else, guaranteeing that he would promptly pay all debts incurred by him in the prosecution of the work of

Board of Commissioners of Pike County v. Norrington.

building said bridge, including labor, materials furnished, and for boarding the laborers thereon; that the appellant did not take or receive from said Dare any such bond, nor did he ever execute any such bond as required by the act of March 14th, 1877; that at the time of performing said labor and furnishing said materials to said Dare, which were used by him in the construction of said bridge, the appellee believed, as he lawfully might, that the appellant had, in compliance with law, required of and received from the said Dare a bond, payable to the State of Indiana, guaranteeing that said Dare should promptly pay all debts incurred by him in the building of said bridge, including labor, materials furnished, etc., as provided by law; that, so believing, the appellee performed said labor, and furnished said materials, for which said Dare agreed to pay him said sum of \$829, and that, so believing, he did not take any steps to hold the appellant liable by giving it written notice that Dare was so indebted to him for said labor and materials; that said bridge was finished and received by appellant, and the appellant paid said Dare in full for building said bridge the sum of \$3,500, and said Dare had left the State, leaving no property subject to execution, before the appellee discovered that appellant had failed to require of and take from said Dare the said bond, as provided by law; that, at the time it paid said Dare said sum of money, the appellant well knew that he was indebted to the appellee in said sum of \$829, for said labor and material so furnished for, and used by said Dare in, the construction of said bridge, and that the appellee had demanded said sum of money from said Dare, which he had failed to pay.

And the appellee averred and charged that, by reason of the appellant's failure to take from said Dare said bond, as provided by law, he, the appellee, was damaged in the sum of one thousand dollars; and that before the commencement of this suit the appellee demanded of the appellant payment of said sum of \$829, and the appellant refused to pay said sum or any part thereof. Wherefore, etc.

Board of Commissioners of Pike County v. Norrington.

The act of March 14th, 1877, referred to in the third paragraph of appellee's complaint, is entitled "an act to indemnify counties against loss in certain cases, and to protect laborers, material-men and others from loss by persons contracting for county buildings and work." The act contained two sections. Omitting the enacting clause, the first section reads as follows:

"That no bid for the building or repairing any court-house, jail, poor asylum, bridge, fence or other county building or work, shall be received or entertained by the board of commissioners of any county in this State, unless such bid shall be accompanied by a good and sufficient bond, payable to the State of Indiana, signed by at least two resident freehold sureties, which bond shall guarantee the faithful performance and execution of the work so bid for, in case the same is awarded to said bidder, and that the contractor so receiving said contract shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished and for boarding the laborers thereon."

Section 2 of said act provides as follows: "That any laborer and material-man, or person furnishing board to said contractor, as in the first section of this act provided, and having a claim against such contractor therefor, shall have the right of action against such contractor and his bondsmen therefor: *Provided*, such person shall have first demanded payment of the same from such contractor." Acts 1877, Spec. Sess., p. 29.

It will be observed that this is an original act, and does not purport, in any of its provisions, either to amend or repeal any existing legislation. On March 11th, 1875, an act was approved amending the first, second and third sections of "An act regulating the sale of county property, and the letting of buildings and bridges, fences and monuments, and declaring an emergency," approved December 23d, 1872. In said amended third section, it was provided, among other

Board of Commissioners of Pike County v. Norrington.

things, that the county board should require of the lowest responsible bidder "a bond with two good freehold sureties, in a penalty of at least one-fourth the cost of such work, conditioned for the faithful performance of such work, according to the plans and specifications so deposited, and the time, terms and conditions mentioned in said advertising of letting. Said bond shall be the only requirement said commissioners may demand of such lowest responsible bidder as a qualification for said work." 1 R. S. 1876, p. 375. This amended third section is not repealed, but it is materially modified by the provisions of the act of March 14th, 1877, above quoted, in at least two important particulars. The requisite bond must, under the later act, accompany the bid, and must guarantee, not only the faithful performance of the work, but that the contractor will "promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished and for boarding the laborers thereon."

In the third paragraph of his complaint, the appellee alleged, as we have seen, that the appellant had failed to require of and receive from the said Dare, as the contractor for the building of the bridge mentioned, the bond called for by the provisions of the above quoted act of March 14th, 1877. In other words, the appellee alleged that the appellant had failed to require of and receive from Dare a bond guaranteeing that he would promptly pay all debts incurred by him in the prosecution of the work of building said bridge, including labor, materials furnished, and for boarding the laborers thereon; that the appellee had performed labor and furnished materials, at Dare's request, in the construction of said bridge, and believing that the appellant had discharged its statutory duty in the premises, by exacting from Dare the requisite bond, he had taken no steps to secure the payment of the amount due him from Dare, for such labor and materials, until it was too late; and that, by means of the premises, he

Board of Commissioners of Pike County v. Norrington.

was damaged in the amount that Dare owed him for his labor done and materials furnished. Does the failure or neglect of the appellant to require of and receive from Dare the bond called for by the provisions, above quoted, of the first section of the act of March 14th, 1877, render it liable to the appellee in damages for the amount due him from Dare for his work done, and materials furnished, at Dare's request, in the construction of said bridge? This is the question, as it seems to us, presented for our decision by the demurrer to the third paragraph of the complaint. We are clearly of the opinion that the question stated ought to be, and must be, answered in the negative. The appellee had no right to rely upon his mere belief that the appellant had required of and received of Dare the bond called for by the provisions of the statute; and if, as alleged, he did rely upon his belief that the appellant had exacted such bond, he acted at his peril in so doing, and the damages sustained by him were his loss and not the loss of the appellant. The act of March 14th, 1877, as its title indicates, was passed "to indemnify counties against loss" upon contracts made by county boards for the construction or repairs of public buildings. Certainly, it was not contemplated by the Legislature, in the enactment of that act, that if, from any cause, the board of commissioners of any county should fail or neglect to require of and receive from the contractor, for the construction or repairs of any county building, the bond provided for in the first section of the act, the county should be held liable to any third party for any loss or damages which might be claimed to result from such failure or neglect. There is nothing in the act which imposes any liability upon the county in such a case; and the courts are not authorized to extend the provisions of the act by construction, so as to impose such liability upon the county.

For the reasons given, we are of the opinion that the facts stated by the appellee in the third paragraph of his complaint were not sufficient to constitute a cause of action against the

Board of Commissioners of Pike County v. Norrington.

appellant, and that its demurrer to the paragraph ought to have been sustained.

This conclusion renders it unnecessary for us to consider or pass upon any of the other errors assigned by the appellant upon the record of this cause, or to decide any question thereby presented. The appellee's claim against the appellant is stated, without doubt, as fully and as strongly as the facts of the case will warrant, in the third paragraph of his complaint; and, upon the facts there stated, it seems clear to us that the appellant can not, in any event, be held liable to the appellee in damages for the amount of his claim against Dare. Under this view of the case, the other errors assigned by the appellant are unimportant, and we need not consider them.

The cross errors assigned by the appellee present for decision the single question, whether or not a mechanic's lien can be acquired upon, or enforced against, a public bridge erected by a county board on, and constituting a part of, a public highway, by a mechanic, material-man or other person performing labor thereon. Upon this question, we have no doubt. We do not think that such a bridge can be regarded as a "building," within the purview of section 647 of the civil code of 1852; and we are clearly of the opinion that public policy forbids either the acquisition or enforcement of such a lien upon or against such a bridge. In each of the first, second and fourth paragraphs of his complaint, the appellee sought to enforce such a lien upon such a bridge; and to each of these paragraphs, the appellant's demurrer was sustained. These rulings were right, as it seems to us; and, therefore, we hold that appellee's cross errors are not well assigned.

The judgment is reversed, at appellee's costs, and the cause is remanded, with instructions to sustain the demurrer to the third paragraph of the complaint, and for further proceedings in accordance with this opinion.

Harmon *et al.* v. The State, *ex rel.* Pelton.

No. 8778.

89 197
130 313

HARMON ET AL. v. THE STATE, EX REL. PELTON.

SHERIFF'S SALE.—*Levy of Execution on Personal Property, which is Wasted.—Judgment.—Bond.—Principal and Surety.*—A sheriff who levies upon and wastes sufficient personal property, belonging to the principal in the judgment, to satisfy the writ, and afterwards with said writ levies upon and sells real estate of a surety in said judgment, does not thereby render himself and his sureties liable upon his bond to the owner of such property.

SAME.—*Satisfaction of Judgment.—Sale Thereafter does not Divest Title.*—A levy upon sufficient personal property, which is wasted, satisfies the writ, and a sale thereafter of real property upon such writ does not divest the title of the owner of the property.

SAME.—*Estoppel.*—In a suit against a sheriff and the sureties upon his bond, where the plaintiff alleges the invalidity of a sale made by him, he and his sureties are not estopped to insist that such sale did not divest the plaintiff's title to such property.

From the Tippecanoe Circuit Court.

W. C. Wilson and J. H. Adams, for appellants.

T. L. Merrick, H. S. Travis and W. D. Wallace, for appellee.

BEST, C.—This action was brought by the State, on the relation of Henry C. Pelton, against Theophilus K. Harmon and his co-appellants, as his sureties, upon his bond as sheriff of Benton county, Indiana.

The breach assigned was that, during Harmon's term of office, a judgment was recovered against Joseph L. Carnahan as principal and the relator as his surety, in the Benton Circuit Court, for \$217.03; that an execution, reciting such relation and directing the sheriff to first exhaust the property of said Carnahan, was delivered to said Harmon, who, by virtue thereof, levied upon personal property belonging to said Carnahan, of the value of \$1,000, and more than sufficient to satisfy said judgment, interest and costs; that said Harmon failed and neglected to sell said property, but wrongfully abandoned said levy and suffered said property to be wasted and carried away; that afterward, without any disposition of said levy, said Harmon levied said writ upon real property of the rela-

Harmon et al. v. The State, ex rel. Pelton.

tor, of the value of \$500, and sold the same to satisfy said execution, thus compelling the relator to pay \$228.48 upon said judgment, interest and costs.

A demurrer to the complaint for want of facts was overruled, and this ruling was reserved.

An answer in denial, with some special paragraphs and a reply in denial of the special paragraphs, was filed.

The issues were submitted to a jury, and a verdict returned for the appellee; upon which, over a motion for a new trial, final judgment was rendered. A motion in arrest of judgment was also made and overruled.

The appellants appeal, and, by the proper assignments of error, insist that the court erred in overruling the demurrer to the complaint, in overruling the motion for a new trial and in overruling the motion in arrest of judgment.

The appellants insist that the demurrer to the complaint should have been sustained, as the complaint upon its face shows that the execution upon which the relator's property was sold had been satisfied, and for that reason it could not have injured him.

The appellee admits that the execution upon which the sale was made had been satisfied, but insists that, notwithstanding such fact, the sheriff and his sureties are liable for such act.

The question presented is whether a sale of real estate, as averred by a sheriff, upon a writ that has been satisfied, renders the sheriff and his sureties liable upon his bond to the owner of the property?

This question must, we think, be answered in the negative.

The satisfaction of the writ extinguishes the judgment. If the writ is paid, or if sufficient property is levied upon to satisfy the writ, and through the misconduct or negligence of the officer the property is lost or destroyed, in either case the judgment is extinguished. *State, ex rel. Wilber, v. Salyers*, 19 Ind. 432; *State, ex rel. Sage, v. Prime*, 54 Ind. 450; *McCabe v. Goodwine*, 65 Ind. 288.

Harmon *et al.* v. The State, *ex rel.* Pelton.

If the judgment is satisfied, of course it can make no difference how satisfied, and a sale thereafter made as averred in the complaint can neither confer any title upon the purchaser, nor injure the owner of the property. In the case of *State, ex rel. Wilber, v. Salyers*, 19 Ind. 432, this precise question arose, and it was held that the owner of the property could not maintain an action against the sheriff and his sureties upon his bond, under such circumstances. In that case executions issued upon eight judgments rendered at different times against the same party, were in the hands of the sheriff, who, upon the executions issued upon the first, fifth and sixth judgments, sold property for money enough to pay the first four judgments, but did not apply any of it upon the executions issued upon the second and third judgments. At such sale the relator purchased, upon the writ issued upon the fifth judgment, a parcel of land, and afterwards the sheriff, with writs issued upon the second and third judgments, levied upon and sold the land so purchased by the relator. Thereupon the relator sued the sheriff and his sureties upon his bond, and it was held that, as sufficient money had been realized from the sale first made to satisfy the first four judgments, the second and third judgments were satisfied, and that a subsequent sale upon writs issued upon such judgments was a nullity, and did not injure the relator.

The court, after saying that the sale was "an absolute nullity," added: "From all that is stated in the complaint, it does not appear that Wilber's title is at all affected by the sale made on the 30th of January, 1858; hence, he seems to have no valid cause of action against the sheriff. Whether or not, had his title been defeated by the latter sale, he could have sued the sheriff, on his bond, for making a false return to an execution in favor of another, or for not properly applying the proceeds of the first sale, or whether he should have taken steps to stop the second sale, we need not determine. The ground upon which we place the case is, that it does not ap-

Harmon *et al.* v. The State, *ex rel.* Pelton.

pear that the relator has been injured by the wrongful acts of the sheriff."

This case was approved by this court in the case of *State, ex rel. Sage, v. Prime*, 54 Ind. 450, and must be regarded as conclusive of this question.

The writ in the above case was issued after the judgment had been satisfied, but that fact can make no difference. If the sale is made after the judgment is satisfied, the result is the same, whether the sale is made upon a writ issued before or after its satisfaction.

The appellee refers us to the cases of *State, ex rel. McCullough, v. Druly*, 3 Ind. 431, and *Snell v. State, ex rel. Keller*, 43 Ind. 359, as establishing a contrary doctrine.

The latter does not decide the question here involved. A sheriff had collected upon an execution more money than was due, upon a threat to levy unless the amount demanded was paid, and in a suit upon his bond it was held that he and his sureties were liable for the excess. This is not in conflict with the conclusion we have reached.

In the former case, a constable, who had levied upon and wasted sufficient personal property to satisfy his writ, afterwards levied upon and made the money out of personal property belonging to the replevin bail. In a suit upon his bond for such money, it was held that he and his sureties were liable under the statute of 1843. That case was unlike the present, and does not determine the question here presented. The sale of personal property by an officer differs from the sale of real property. In the former the officer takes and delivers possession, while in the latter he does neither; the former causes loss, while the latter does no injury. In this respect, they are essentially different. Had the relator averred that he had been put to trouble or expense in removing the cloud thus created upon his title, a different question would have arisen.

Following 19 Ind., *supra*, we are of opinion that the complaint was insufficient, and that the demurrer should have been sustained.

Harmon *et al.* v. The State, *ex rel.* Pelton.

This conclusion renders it unnecessary to decide any other question presented by the record.

The judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the costs of the relator, with instructions to sustain the demurrer to the complaint.

ON PETITION FOR A REHEARING.

BEST, C.—The appellant has filed a petition for a rehearing, supported by an elaborate brief, in which it is insisted that the case of *State, ex rel. Wilber, v. Salyers*, 19 Ind. 432, should be overruled, and that the complaint was good because the appellees are estopped to dispute the validity of the sheriff's sale. No case has been cited, questioning the doctrine announced in the case of *State, ex rel. Wilber, v. Salyers*, and no reason has been suggested or occurs to us why the doctrine therein declared is not sound in principle, or why it should not be followed. It protects the relator in the enjoyment of his property, and prevents the assertion of an apparent lien against it. This protection is ample, and it necessarily follows that the relator was not injured by such sale. Nor are the appellees estopped to deny this fact. They do not aver the invalidity of the sale. The appellant avers such facts as render the sale void; the appellees admit them, and insist that these facts create no liability against them. This they may do. They are not estopped to insist that the law upon the facts stated by the appellant is with them. *Willson v. Glenn*, 77 Ind. 585; *State, ex rel. Ross, v. McLaughlin*, 77 Ind. 335.

As they averred nothing, there was no estoppel, and therefore the petition should be overruled.

PER CURIAM.—Petition overruled.

 Growcock v. Hall.

No. 9309.

GROWCOCK v. HALL.

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136	75

NEGLIGENCE.—Animal.—Stallion.—Evidence.—Where one assuming to own a stallion contracts for his service, and by negligent management the mare is injured, he is liable, and proof that he was really the owner of the stallion is not essential.

INSTRUCTION.—Evidence.—Practice.—An instruction to the jury which recites a part only of the evidence, excluding some which is material, and declaring that the evidence recited will not justify a recovery, should not be given.

VERDICT.—Interrogatories.—To determine whether the answers of a jury to interrogatories are inconsistent with the general verdict, all the answers must be considered.

MASTER AND SERVANT.—Negligence.—Contract.—Evidence.—Representations.—An express contract is not essential to create the relation of master and servant; it may be implied from circumstances; so that the master will be liable for the negligence of the servant, though in fact the relation did not exist, as where he induces the belief, and thereby leads another to act upon it to his injury.

From the Noble Circuit Court.

H. G. Zimmerman, for appellant.

A. A. Chapin and *R. P. Barr*, for appellee.

ELLIOTT, J.—The complaint charges that the appellant undertook to cause a stallion owned by him to serve a mare of the appellee, and by his negligent and careless management caused the mare to receive an injury from which she died.

The instructions given by the court are complained of. The second instruction informs the jury that it was not essential to a recovery that the appellee should prove that appellant was actually the sole or absolute owner of the stallion. In view of the evidence, the instruction was correct. The appellant made the agreement with the appellee as owner, was so treated throughout the transaction, and is not now in a situation to defeat a recovery by showing that in fact others were interested with him in the ownership of the horse. Where a person represents himself as an owner, as such contracts and

Growcock v. Hall.

is contracted with, the person with whom he contracts may sue and recover against him as an owner,

Other instructions assert the same general principle, and what we have said disposes of the objections urged against them.

The sixth instruction asked by appellant was properly refused. It selects certain items of evidence, excludes all others and declares that the items recited would not be sufficient to entitle the appellee to a finding. An instruction which seeks to place before a jury part only of the evidence, and excludes facts or circumstances material to the point in issue, is erroneous.

It is insisted that the answers to interrogatories are inconsistent with the general verdict, and show a right of recovery in the appellant. If one or two of the answers were separated from the others, it would be difficult, if not impossible, to reconcile the answers to interrogatories with the general verdict. They are not, however, to be so taken. All the answers are to be taken together. They constitute, not separate and divisible findings, but one entire finding. Taking all the answers together, there is no serious conflict between them and the general verdict, and there was no error in rendering judgment on the latter.

The principal part of appellant's argument is devoted to a discussion of the proposition that the verdict is not sustained by the evidence. We think the entire argument proceeds on an erroneous view of the law. The relation of master and servant may be implied. It is not necessary, as appellant's argument tacitly assumes, that it should be created by express contract. It was sufficient for the appellee to show that the servant, who actually had charge and control of the horse at the time the mare was injured, was acting by appellant's procurement for him and in his behalf.

Where one represents to another that a designated person is his servant or agent, and induces the person to whom such representations are made to confide therein, and he acts upon the belief that such relationship does in fact exist, an action

Rice v. Morris *et al.*

may be maintained for the servant's negligence, although the relationship of master and servant did not exist. If, in this case, the appellant induced appellee to believe that Hull, the person who had the immediate management of the horse, was his servant, managing and controlling the horse of which he, the appellant, was the general or qualified owner, the verdict was right, although appellant may have been the mere agent of an undisclosed principal of whom Hull was also the servant. The question in such a case as this does not always go back to the real, actual relationship, for if the appellant knowingly induced the appellee to believe in the existence of a certain state of affairs, to contract and pay out money in the faith that such a state did actually exist, and in ignorance of the real facts, he can not, after loss has resulted from the servant's negligence, defeat appellee's recovery, by showing that, in truth, a different state of affairs existed.

Judgment affirmed.

88 204
128 64

No. 7632.

RICE v. MORRIS ET AL.

SUBROGATION.— *Replevin Bail.*— *Principal and Surety.*— *Mortgage.*— Where several notes are secured by a mortgage, and a personal judgment is obtained on the note first due, a surety for stay of execution, who is compelled to pay the judgment, can not be subrogated to the mortgage security for reimbursement, unless he pays the entire indebtedness secured by the mortgage, or the same is otherwise satisfied without exhausting the mortgaged property. *Gerber v. Sharp*, 72 Ind. 553, distinguished.

From the Kosciusko Circuit Court.

J. S. Frazer, W. D. Frazer and R. B. Encell, for appellant.
H. S. Briggs, for appellees.

NIBLACK, J.—This was a suit by Scott Rice, as the assignee by delivery only, against Benton Q. Morris, Isaiah J.

Rice v. Morris *et al.*

Morris and Andrew J. Bates, upon a promissory note executed on the 21st day of March, 1874, for \$564, and payable to the order of the Bank of Middleport in the State of Ohio, four months after date.

Bates answered, setting up his suretyship on the note, as to which there was no controversy. The other two defendants answered in three paragraphs.

The first charged that the plaintiff held five promissory notes of \$900 each against one Barnes, all dated the 16th day of November, 1872, and due at different times, which were secured by a chattel mortgage on certain personal property situate in the counties of Wabash and Huntington respectively; that the plaintiff had obtained judgment against Barnes in the Wabash Circuit Court on the note first due for the sum of \$575.52, and a decree of foreclosure on the mortgaged property situate in Wabash county, which judgment the plaintiff had assigned to one Keys; that the plaintiff afterwards sold the remaining notes and the mortgage given to secure them as above stated to the said defendants Morris and Morris, and assigned said notes and mortgage to the said Isaiah J. Morris by an endorsement in writing on the mortgage; that the consideration for the sale and assignment of said notes and mortgage was the payment to the plaintiff of the sum of \$1,486 in money and the execution and delivery of the note sued on; that the mortgaged property situate in Huntington county did not exceed the sum of \$1,000 in value, and that all of said mortgaged property was not worth more than \$2,050; that the plaintiff falsely represented to the defendants Morris and Morris, that the judgment in the Wabash Circuit Court against Barnes on the first note was a personal judgment only and not a judgment of foreclosure; that execution had been stayed thereon by the entry of replevin bail, and that such judgment was not a lien on any of the mortgaged property, and that such property was free from all incumbrances except to secure the payment of the remaining notes, of which the defendants Morris and Morris became the

Rice v. Morris et al.

purchasers as above set forth; that the defendants Morris and Morris were ignorant of the character and condition of said judgment and relied on the representations of the plaintiff which were in fact false; that said defendants were compelled to pay and did pay on said judgment the sum of \$756 to obtain the release of the mortgaged property in Wabash county from sale thereon; that the notes against Barnes purchased by said defendants remained unpaid, Barnes being insolvent. Wherefore it was averred that the consideration of the note in suit had failed.

The second paragraph was substantially the same as the first, except that it charged that the judgment of foreclosure in the Wabash Circuit Court was upon all the mortgaged property, and that the defendants Morris and Morris had to pay the sum of \$550 to obtain the release of such property from sale.

The third paragraph was but a repetition in a different form of the facts which had already been charged either in the first or second paragraph.

The plaintiff severally demurred to each of the paragraphs of the answer of Morris and Morris set out as above, but his demurrers were overruled as to all of the paragraphs. Issue being joined, a trial resulted in a verdict and judgment for the defendants.

The only question presented by this appeal is, were the several paragraphs of the answer of Morris and Morris sufficient upon demurrer?

The appellant contends that the representation, that the judgment in the Wabash Circuit Court against Barnes was a personal judgment only, was an immaterial representation, because, if it had been only a personal judgment, and the replevin bail should have had to pay it, they would have been subrogated to an interest in the mortgage for their reimbursement, and that hence, in any event, the mortgage would have remained as a security for the payment of that judgment.

It is a well settled rule, that where a surety is compelled to

Rice v. Morris *et al.*

pay a debt for which the creditor holds other security, he is thereby subrogated to the right of the creditor in such other security for his reimbursement ; but this court has held, in the case of *Zook v. Clemmer*, 44 Ind. 15, that this rule is only applicable where the surety pays the entire debt, or where the balance of the debt not paid by the surety has been otherwise paid in full. If in this case the judgment in the Wabash Circuit Court had been only a personal judgment, the entry of replevin bail would have afforded the appellant additional and independent security in the collection of the judgment.

If this were not so, the only effect of the entry of replevin bail would have been to have delayed the issuing of execution on the judgment, thus resulting in an absolute injury, instead of a benefit to the appellant.

In such a case we think the replevin bail would have only been entitled to subrogation to the rights of the appellees Morris and Morris, in the mortgage, upon full payment of all the indebtedness which it was executed to secure, or to an interest in any surplus which might have remained after the notes purchased by the said Morris and Morris had been paid.

Morris and Morris, being the holders of the legal title to the mortgage, were entitled to preference over all others not having some prior equity in the mortgaged property.

We are of the opinion that the representation, that the judgment in the Wabash Circuit Court was a personal judgment only, was a material representation, and that the court below did not err in overruling the demurrers to the several paragraphs of the answer of Morris and Morris.

This case must be distinguished from the case of *Gerber v. Sharp*, 72 Ind. 558, as in that case Gerber was surety on the first note which the mortgage was given to secure.

The judgment is affirmed, with costs.

Opinion filed at the May term, 1881.

Petition for a rehearing overruled at the May term, 1882.

 Wayne, Union and State Line Turnpike Company v. Moore.

No. 8711.

 WAYNE, UNION AND STATE LINE TURNPIKE COMPANY v.
MOORE.

GRAVEL ROAD.—Turnpike.—Tolls.—Under the general statute providing for the construction of macadamized, gravel and plank roads, it is not necessary, to warrant the collection of tolls, that the "hard and even surface" required by section 3627, R. S. 1881, should be wide enough for vehicles to pass each other thereon.

INSTRUCTIONS.—Practice.—Harmless Error.—Instructions should be pertinent to the issues made by the pleadings, but an error in this respect may sometimes be harmless.

From the Wayne Circuit Court.

W. A. Bickle, for appellant.

H. U. Johnson and *T. J. Study*, for appellee.

FRANKLIN, C.—This is an action by appellant against appellee to recover tolls for travelling over its road.

The error assigned by appellant is the overruling of its motion for a new trial.

Appellee has assigned a cross error upon the overruling of his demurrer to the complaint.

The questions presented under the motion for a new trial arise upon the instructions of the court to the jury.

These instructions are very voluminous, and twenty-four in number. The 11th, 13th, 18th, 20th, 21st and 24th are specially complained of.

In order to understand the application of these instructions, the evidence not being in the record, it is necessary to state the issues.

There was an answer filed in three paragraphs: 1st. A denial; 2d. The road was out of repair; 3d. *Nul tiel* corporation. And a reply in denial. The questions discussed arise under the second issue. And the second paragraph of the answer contained the following specifications of want of repair in the road: "That during the whole of said period and time said road was not smooth, nor was the surface hard and

Wayne, Union and State Line Turnpike Company v. Moore.

even, nor was said road properly covered with stone or gravel or any other hard substance, nor was the track thereof eight and a half feet wide, nor was the covering six inches thick ; that the road was in many places so narrow that it was impossible for persons travelling along the same with vehicles to pass each other ; that the road-bed was worn out, and the bridges and culverts decayed and dangerous ; that the grade was uneven, and that it was permitted to remain so out of repair during all of the time for which appellant claimed toll, and for a much longer period than was necessary to put the same in repair with a reasonable force."

Under this issue, the court, in instruction numbered 9, stated to the jury the substance of section 3 of the gravel road law, 1 R. S. 1876, p. 654, which reads as follows :

"The directors may determine the particular manner of construction so as to secure and maintain a smooth and permanent road, the track of which shall be made either of plank, stone, gravel, or other hard material, or in such proportions of either as the directors may deem expedient, so that the same shall form a hard and even surface."

Instruction numbered 11 was based upon the foregoing section, and reads as follows :

"This section contemplates the practicability of so constructing a road of plank, stone, gravel, or other hard material, so that the surface shall remain permanently hard and even, unaffected in any considerable degree by wet weather or the action of the frost."

Instruction 12, immediately succeeding, ought to be considered in connection therewith ; it reads as follows :

"Absolute evenness or hardness is not required ; slight inequalities of surface, or a surface that would admit of the formation of a thin layer of slush or mud upon a comparatively hard and smooth formation after the falling rain, or the melting of snow, or a thaw succeeding freezing weather, would not, under said section, be deemed faulty construction."

Wayne, Union and State Line Turnpike Company v. Moore.

Taking the two instructions together, we think they furnish a fair exposition of the meaning of the statute upon the subject of the construction of gravel roads. But in this case there is no complaint of defective construction of the road; the appellee only charges a failure to keep it in good repair. However well the road may have been constructed, the statute requires that it should be maintained in a reasonably good condition in order to collect tolls for the use of it. The instruction should have followed the complaint and applied to repairs instead of construction.

We see no reasonable objection to the 18th instruction, except that it also applied to the construction, as well as to repairs, which additional application is, perhaps, harmless.

The 20th instruction reads as follows: "Macadamized, plank or gravel roads are not properly constructed unless they have a hard and even surface of sufficient width for one vehicle to pass another without delay or hindrance, and if a road is so constructed that one traveller in a vehicle can not pass another vehicle without hindrance or delay, tolls can not be exacted on such road until the defect is remedied."

This instruction is also applied to the construction of the road, and requires a degree of perfection not required by the statute. In order to collect tolls, the statute does not require that a gravel road should be constructed and maintained with a double track of hard and even surface, so that vehicles could pass upon the hard and even surface without momentary hindrance or delay. Our Legislature has fixed the minimum width of a gravel road upon which tolls may be legally collected at eight and one-half feet. 1 R. S. 1876, p. 665, sec. 1. And the courts will take judicial notice that ordinary vehicles can not pass each other, without hindrance or delay, within that distance, any easier than trains could pass each other upon a single track railroad without the use of switches.

For authority that single track gravel roads, of not less than eight and one-half feet in width, can be used, and for

Wayne, Union and State Line Turnpike Company v. Moore.

the use of which tolls can be legally collected, see the case of *Neff v. Mooresville, etc., Gravel Road Co.*, 66 Ind. 279.

The 21st instruction is upon the same subject and applies to repairs, and reads as follows :

"21st. If a turnpike is constructed of sufficient width for travellers in vehicles to pass without hindrance or delay, and it thereafter is suffered to become so narrow at one or more places that a traveller in a vehicle could not pass another vehicle without hindrance or delay, and is suffered to remain in such condition for a longer period of time than would be required to make the necessary repairs of such places with a reasonable force, the season of the year and other equitable circumstances considered, toll could not be collected for the use of such road, at such places, while the same shall remain in such condition."

This instruction requires the repairs to be made to the extent of furnishing a double track, of hard and even surface, throughout the entire length of the road ; which we do not think is required or contemplated by the provisions of our statute.

While a double track of hard and even surface would certainly make a better road than a single track, still it is equally certain that it is better for travellers to undergo the slight inconvenience of momentary hindrance and delay in passing each other, and have a good solid single track road to travel on, than to trudge through the deep slush and mud all the way.

The cause appears to have been tried upon the theory, and the instructions based upon the fact, that the corporation was organized and operating under the general gravel road law of the State, and not under any special charter requiring the width of a double track.

In the instruction numbered 8, the court instructed the jury that the general gravel road law passed in 1852 governed the case.

The 9th instruction copied the 3d section thereof, and the instructions complained of are based upon the same fact ;

O'Donald v. Constant.

thus rebutting any presumption, by showing the fact to be otherwise, that the corporation was organized under some special charter requiring a double track, and that evidence might have been given making instructions numbered 20 and 21 applicable thereto.

We must conclude that the corporation was organized and acting under the general law and not a special charter. And under the general law, no state of the evidence could have existed that would make these instructions correct and applicable to the case.

We think the court erred in giving instructions numbered 20 and 21, which error will require a reversal of the judgment, and render it unnecessary to extend this opinion by any further examination of the instructions.

The court below erred in overruling the motion for a new trial.

Upon the cross assignment of errors by appellee, we find no error in overruling the demurrer to the complaint.

The judgment below ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is in all things reversed, at appellee's costs, and that the cause be remanded with instructions to the court below to sustain the appellant's motion for a new trial, and for further proceedings in accordance with this opinion.

No. 8831.

O'DONALD v. CONSTANT.

FRAUDULENT CONVEYANCE.—*Preference of Creditor.*—A failing debtor may prefer one creditor over another, and, to that end, may use property bought on credit of one for the payment of another.

SAME.—*Rescission and Affirmation of Contract.—Attachment.*—While a creditor of whom the debtor had bought goods, not intending to pay for them, but

88	212
126	106
126	345
88	212
126	508
82	212
138	19
82	212
146	588
82	212
164	438
82	212
165	242

O'Donald v. Constant.

to use them in preferring other creditors, may doubtless disaffirm the sale, and recover his goods, unless resold to an innocent purchaser, yet, by bringing an attachment suit against his debtor, he affirms the sale, and takes the place of an ordinary creditor.

PRACTICE.—*Motion for New Trial.*—The motion for a new trial can not on appeal be regarded as evidence of the facts stated therein, although the motion itself becomes a part of the record, without a bill of exceptions.

SAME.—*Special Instructions, How Made Part of Record.*—Instructions given must be signed by the judge, and in order to be made part of the record, under sections 533 and 535, R. S. 1881, must be filed, and the fact of the filing must be shown in the transcript.

From the Miami Circuit Court.

J. L. Farrar, J. Farrar, S. D. Carpenter, H. J. Shirk, J. Mitchell and R. P. Effinger, for appellant.

C. M. Emerick and M. Winfield, for appellee.

WOODS, J.—Assigning for error the overruling of his motion for a new trial, the appellant complains of the giving and refusing of instructions, and that the verdict is contrary to the law and the evidence.

No question in reference to instructions is properly presented. Copies of certain instructions appear in the transcript immediately following the motion for a new trial, and apparently as a part of the motion. If not a part of that motion, then it does not appear that they were filed, as the transcript contains no copy of the clerk's notation of the filing, nor any recital that they were filed.

It has often been decided that the statements in a motion for a new trial can not, on appeal, be regarded as evidence of the facts so stated. *Zehner v. Aultman*, 74 Ind. 24; *Smith v. Kyler*, 74 Ind. 575. It is equally clear that instructions, in order to be made a part of the record, under sections 324 and 325 of the code, must be filed as a part of the record, and the fact of such filing must be shown in the transcript. The instructions given must be signed by the judge, and that is not done in this case.

The question of fact in the case was whether the sale of a stock of goods was, in respect to creditors represented by the appellant, a fraudulent sale.

Porter et al. v. Mitchell et al

The appellee had purchased the goods of one Shinn, who had recently bought them on a credit of Carnahan, Skinner & Co. Treating the sale to the appellee as fraudulent, Carnahan, Skinner & Co. sued out an attachment, by virtue of which the appellant, as sheriff, seized the goods; whereupon the appellee brought this action for the recovery of possession. The evidence tends strongly to show that the sale by Shinn to the appellee was made for the purpose of paying other creditors of Shinn, to the exclusion of Carnahan, Skinner & Co., and counsel insist that the sale was, therefore, fraudulent and void. The law is otherwise well settled in this State. The failing debtor may prefer one creditor over another, and the use of property bought of one for the payment of another is not an exception to the rule. *O'Connor v. Coats*, 79 Ind. 596.

If Carnahan, Skinner & Co. had reclaimed the goods as their own, on the ground that Shinn had obtained them without intent to pay for them and for the purpose of preferring and paying his other creditors, and that the appellee was cognizant of that scheme when he made his purchase, the question would be manifestly different; but when they caused the goods to be attached as the goods of Shinn, they affirmed his title, and placed themselves in the position of ordinary creditors, entitled to impeach the sale to the appellee on no ground which was not equally available to any other creditor.

Judgment affirmed, with costs.

No. 9208.

PORTER ET AL. v. MITCHELL ET AL.

ACTION TO QUIET TITLE.—*Answer.*—*Tax Title.*—In an action to quiet title, an answer that the defendant has purchased the property for taxes duly assessed upon it, and claims no other interest, is sufficient on demurrer.

Porter *et al.* v. Mitchell *et al.*

SAME.—Reply.—General Denial.—In such action, an answer that the defendant owns a part of the land in fee, and disclaims any interest in the residue, and denies that he ever claimed it, is sufficient as an answer in denial; such answer closed the issues, and there was, therefore, no error in sustaining a demurrer to special paragraphs of a reply to such answer.

SAME.—Counter-Claim.—Practice.—The fact that such answer contained a prayer for affirmative relief does not render it a counter-claim; but if regarded as a counter-claim, the reply must be regarded as answer, and as the general denial was filed, under which all defences were admissible, there was no error in sustaining a demurrer to a special paragraph of reply to the answer.

From the Montgomery Circuit Court.

E. C. Snyder, for appellants.

M. W. Bruner, for appellees.

BEST, C.—This action was brought by the appellants against the appellees to quiet their title to a part of lots 9 and 10 in the original plat of the city of Crawfordsville, Indiana. The complaint averred that the appellants were the owners in fee of the property, describing it, and that the appellees "claim and pretend to have a paramount title by virtue of a sale of the same for taxes" under a foreclosure sale upon certain mortgages executed to the school fund.

The appellees filed separate answers. Each answer consisted of two paragraphs, the first a general denial and the other special.

By the second paragraph of William J. Mitchell's answer, he averred that he owned a part of the lots described in the complaint, specifically describing the portion alleged to be owned by him, and disclaimed any interest in the residue of the property, averring that he never had claimed any interest therein.

By the second paragraph of the answer of Jemima Lambert, it was averred that the taxes for the years 1878 and 1879, upon said property, became delinquent and remained unpaid; that the treasurer of Montgomery county, on the 2d Monday of February, 1880, duly offered said premises for sale for the payment of such taxes, interest, penalty and costs,

Porter et al. v. Mitchell et al.

but the same failed to sell for want of bidders; that afterward and on the 30th day of March, 1880, the appellee Lambert applied to the auditor of said county, to purchase said premises for such taxes, and paid to the treasurer of said county \$99.04, the amount for which said premises should have been sold, with interest at ten per cent. thereon; that said auditor issued to her a certificate of purchase which she still owns. It was also averred that the treasurer of the city of Crawfordsville sold said premises to the appellee Lambert for \$68.17, that being the amount of taxes, interest, costs and penalty due said city upon said property for the years 1876, 1877, 1878 and 1879; that said taxes were delinquent for some years and remained unpaid; that she paid said sum over to said treasurer, received a certificate of purchase which she still owns, and that she claims no other interest in said property.

Demurrers for the want of facts were overruled to these paragraphs and exceptions reserved.

A reply in two paragraphs was filed to the second paragraph of the answer of Jemima Lambert, and a reply of five paragraphs was filed to the second paragraph of the answer of William J. Mitchell.

The third paragraph of the reply averred that the appellee Mitchell had no title to the property described in the answer other than such as he acquired from Jemima Lambert, and that she had none other than such as she acquired by the voluntary payment of taxes on said property, and by the purchase of the same from the auditor of said county upon nine mortgages executed to the school fund; that said mortgages were executed in 1856, matured four years after date, with interest till due at seven per cent.; that interest for four years and eight months was unpaid at the time of sale, and was, during said time computed at seven per cent.; that the auditor sold it for \$536.02, when only \$519.18 was due upon said mortgages.

The fourth paragraph averred the same facts as the third, except that the auditor sold the property for more than was

due upon the mortgages, but in lieu thereof it was averred that the mortgage provided that if default should be made the mortgagor should pay the loan, with interest and two per cent. damages, and that the auditor added to the amount due two per cent. damages, which was more than the actual damages sustained.

The fifth paragraph of the reply averred that the appellee Mitchell had no title other than such as was acquired through a sale made by the auditor of Montgomery county upon nine mortgages executed to the school fund in June, 1856, and that said mortgages were void for the reason that the sum secured by them exceeded \$300.

A demurrer was sustained to each of these paragraphs, a trial had and final judgment rendered for the appellee.

The following errors are assigned in this court:

"1st. The court erred in overruling the demurrer to the second paragraph of Jemima Lambert's answer.

"2d. The court erred in overruling the demurrer to the second paragraph of William J. Mitchell's answer.

"3d. The court erred in sustaining the demurrer to the third, fourth and fifth paragraphs of the reply."

The second paragraph of the separate answer of Jemima Lambert disclaimed any interest in the property other than such as she acquired by purchase of the property at private sale for delinquent taxes, pursuant to the act for the assessment of taxes. Sections 247 and 248, 1 R. S. 1876, p. 127.

As against this claim the appellants were not entitled to have their title quieted, and, therefore, there was no error in overruling the demurrer to this paragraph of the answer.

The second paragraph of the separate answer of William J. Mitchell alleged that he was the owner of a part of the property described in the complaint, disclaimed any interest in the residue, and denied that he had claimed it.

This answer was good. It disclaimed any interest in a portion of the property, denied that the appellee had ever made any claim to such portion, and denied that the appellants owned

Porter et al. v. Mitchell et al.

the residue, by affirming that the appellee himself owned it. This was in effect a denial, precisely as an answer of property in the defendant or in a stranger, in a replevin suit, is a denial of property in the plaintiff. *Landers v. George*, 40 Ind. 160; *Thompson v. Sweetser*, 43 Ind. 312.

This paragraph was sufficient, and the court did not err in overruling the demurrer to it.

Nor did the court err in sustaining the demurrer to the third, fourth and fifth paragraphs of the reply. The paragraph of the answer to which they were pleaded being a denial, the issue was complete without a reply. *Riddle v. Parke*, 12 Ind. 89; *Uhl v. Harvey*, 78 Ind. 26.

The answer terminated the pleadings. The reply was unnecessary and unauthorized. The matters averred in it could be proved without replying them, and for this reason the demurrer was properly sustained to them.

There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellants' costs.

ON PETITION FOR A REHEARING.

BEST, C.—The appellants insist that a rehearing should be granted because the court misconceived the character of the second paragraph of William J. Mitchell's pleading. They say it was a counter-claim, and not an answer, because affirmative relief was demanded. It concluded with the following prayer: "Wherefore he demands judgment against plaintiffs for his costs, and that his title be quieted in said real estate in his answer described." The record describes it as an answer; the appellants demurred to it as an answer; they replied to it as an answer; they assign error upon it as an answer; they insisted in their original brief that it was bad as an answer, and we have no doubt that it was in fact an answer. If not, the result must be the same. It is conceded that it was good as

Wilcox et al. v. Moudy.

a counter-claim. If it was a counter-claim, the reply was an answer. The first paragraph was a general denial, and under it all defences, legal or equitable, could have been given in evidence. *Graham v. Graham*, 55 Ind. 23.

As all defences were admissible under the general denial, no error was committed in sustaining the demurrer to the remaining paragraphs, though each of them were good. *Patterson v. Lord*, 47 Ind. 203; *Smith v. Denman*, 48 Ind. 65; *Milner v. Hyland*, 77 Ind. 458.

Whether the pleading is to be regarded as an answer in denial, or as a counter-claim, it follows that no error was committed in sustaining the demurrer to the subsequent pleadings, and, therefore, the petition should be overruled.

PER CURIAM.—The petition is overruled.

No. 9294.

WILCOX ET AL. v. MOUDY.

REAL ESTATE.—*Description.*—*National Surveys.*—*County Boundaries.*—*Judicial Knowledge.*—Courts take judicial knowledge of the National surveys and of the territorial boundaries of counties, and where a full and accurate description of land is given, it can be located in the proper county without difficulty.

SAME.—*Complaint.*—*Title.*—*Venue.*—Where the venue is properly laid in the title of a complaint to recover real estate, filed in the circuit court, want of jurisdiction can be shown only by answer.

SAME.—*Rent During Year Allowed for Redemption.*—*Husband and Wife.*—*Demurrer.*—A complaint against husband and wife to recover the rent of real estate for the year allowed for redemption after sale upon a decree of foreclosure is not bad, as against the husband, upon joint demurrer, because of the joinder of the wife.

PLEADING.—*Demurrer by Two or More.*—*Practice.*—Where two or more join in a demurrer, it must be overruled if the pleading to which it is addressed is good as to any one of the demurring parties.

SAME.—A complaint showing a right to some relief is sufficient on demurrer.

From the Hendricks Circuit Court.

88	219
135	357
82	219
164	261

Wilcox *et al.* v. Moudy.

C. C. Nave, for appellants.

D. E. Williamson and *A. Dagg*, for appellee.

ELLIOTT, J.—Appellee instituted this action to recover real estate and damages for its detention.

The appellants assail the first paragraph of the complaint upon the ground that it does not allege that the real estate in controversy is in Hendricks county. It is true that the complaint does not in express terms state that the land is situated in that county, but it gives a full description of it, from which the court can judicially know that it is situated in the county of Hendricks. Courts take judicial knowledge of the National surveys and of the territorial boundaries of counties, and where a full and accurate description of land is given, it can be located in the proper county without difficulty. *Dutch v. Boyd*, 81 Ind. 146.

There is still another reason why the appellants' position can not be maintained. The venue of the action is properly laid in the title, and, as the circuit court is one of general superior jurisdiction, want of jurisdiction can only be raised by answer. *Ragan v. Haynes*, 10 Ind. 348; *Brownfield v. Weicht*, 9 Ind. 394; *Godfrey v. Godfrey*, 17 Ind. 6; *Houk v. Barthold*, 73 Ind. 21.

The second paragraph of the complaint seeks to recover rent for property sold upon a decree of foreclosure and held by the mortgagor during the year allowed for redemption. The appellants' counsel insists that this paragraph is bad because it shows that Julia Wilcox is the wife of her co-appellant. The argument is that she was entitled to one-third of the property immediately upon the sale by the sheriff, and that, therefore, no action could be maintained. The fallacy pervading the argument is a glaring one. If it were broadly granted that the wife's interest became vested at once, as claimed, still the conclusion would by no means follow, for there would be a right to a recovery for at least the two-thirds of the real estate. The complaint certainly states a cause of

Shaffer v. The State.

action entitling appellee to some relief, and a complaint showing a right to some relief will repel a demurrer. *Bayless v. Glenn*, 72 Ind. 5. We are not to be understood as deciding that a wife's interest vests at the time of the sale. We decide nothing upon that point.

Whether the paragraph does or does not state a cause of action against Mrs. Wilcox, is a question which is not before us. The demurrer is by her and her husband jointly, and was properly overruled, for the reason that the complaint is unquestionably good as against her husband. It is a familiar rule of practice that, where two or more join in a demurrer, it will be overruled if the pleading to which it is addressed is good as to any one of the demurring parties.

No judgment for damages was taken against Mrs. Wilcox. The proper judgment having been rendered, the ruling upon the demurrer, even if erroneous, would have been harmless.

Appellants' counsel copies in his brief the causes assigned in his motion for a new trial, but does not discuss them. As there is no discussion of the questions presented upon the ruling on the motion, we must, under the settled rule, consider them as waived.

Judgment affirmed.

No. 10,140.

SHAFFER v. THE STATE.

CRIMINAL LAW.—*False Pretences.*—*Token and Writing.*—*Letter of Agency not Assignable.*—An appointment as agent to sell corn is not assignable; and, being bound to know this, the assignee has no right to rely upon a representation that the transfer would vest in him the title to the corn or the power to sell it.

SAME.—A false pretence, token or writing must be of a nature to deceive, such as the victim, under the circumstances, may rely on.

SAME.—*False Use of Genuine Writing.*—A false use of a genuine writing is not

82	221
133	562
82	221
137	78
82	221
153	87
153	215
82	221
156	172

Shaffer v. The State.

the use of a false token or writing, within the meaning of section 2204, R. S. 1881; as, for example, where A., under a letter of authority, had sold B.'s corn, and afterwards, by means of the same letter, made another sale to another purchaser.

SAME.—Indictment.—Uncertainty.—An indictment which is uncertain in respect to whether it charges a sale of corn, or a transfer by the defendant of a letter of authority to sell the same, is not good.

From the Wabash Circuit Court.

A. B. Shiveley, B. M. Cobb and B. F. Ibach, for appellant.

D. P. Baldwin, Attorney General, *M. Good*, Prosecuting Attorney, *C. W. Watkins*, Prosecuting Attorney, and *J. C. Branyan*, for the State.

WOODS, J.—The appellant was indicted in the Huntington Circuit Court, under section 288 of the act defining public offences, R. S. 1881, sec. 2204, for obtaining money by means of a false token or writing. The indictment was in three counts, but the court sustained the appellant's motion to quash the third, and, overruling the motion as to the first and second counts, granted a change of venue to Wabash county, where, upon trial by a jury, there was a general verdict of guilty, upon which the appellant was sentenced to the State prison for the period of two years and to pay a fine of \$10.

Upon exceptions properly saved, and assigned as error, it is insisted that the court erred in overruling the motion to quash the first and second counts of the indictment, and in other specified particulars.

The first count of the indictment charges that Samuel Shaffer, at the county of Huntington and State of Indiana, on the 13th day of October, A. D. 1881, did feloniously, designedly and falsely pretend and represent to Samuel T. Morgan, that a certain order or token in writing, which he then and there had, purporting to be signed by one Robert Walburn, and dated about the 1st day of October, 1881, and directed to Samuel Shaffer, and authorizing him to sell the interest of Walburn in and to a lot of corn in said county, a more particular description of the order being impossible, because the

Shaffer v. The State.

same had been lost or destroyed, then and there gave him, the said Shaffer, power and authority to sell and dispose of a lot, or part interest in a lot, of corn that had been raised on the lands of George Bippus, in said county, for him, the said Walburn; which false pretences the said Shaffer then and there made for the purpose of inducing the said Morgan to deliver to him the sum of \$5 in money, for the said interest in said corn as aforesaid, and, relying upon and believing the said false pretences to be true, the said Morgan was then and there induced by reason thereof, on receiving the pretended transfer or sale of such corn, to pay to the said Shaffer the said sum of \$5, and the said Shaffer assigned the said order to the said Morgan in writing, the said order being then and there represented by the said Shaffer falsely, fraudulently and feloniously to be good and valid, and that he, the said Shaffer, then and there had full power and right to assign said order, and that, when so assigned, it would give the said Morgan full control and power to dispose of such lot or interest in such corn as aforesaid, by which said false pretence the said Shaffer, with intent to cheat and defraud the said Morgan, feloniously and designedly did obtain the said sum of \$5 of said Morgan; whereas, in truth and in fact, the said Samuel Shaffer had no right, power or authority to sell such lot of corn, for the reason that theretofore, to wit, on the 3d day of October, by virtue of the self-same order from said Walburn, he had sold and conveyed the said lot of corn pretended to be sold to the said Morgan, to one Elisha Rosebaugh, and obtained from him the sum of \$8, and that, when such sale was made to Rosebaugh, Shaffer's power and authority became invalid and of no effect, and he in truth, at the time of such assignment, transfer and false pretence to the said Morgan, had no authority, and said order and assignment were then and there invalid, as Shaffer well knew, to dispose of the said lot of corn, and all of said pretences were false, as he then and there well knew, etc.

What the exact purpose of the pleader in framing this

Shaffer v. The State.

count of the indictment was, we find it difficult to determine satisfactorily. Counsel on either side seem to concede that it charges a fraudulent sale to Morgan by the appellant of Walburn's interest in the corn; but the indication is almost, if not quite, as strong, that instead of a sale the parties intended simply a transfer of the order which the appellant had received from Walburn, and by the transfer of which to Morgan, he represented that Morgan would have "full control and power to dispose of such lot or interest" in the corn.

If the intention was a sale by the appellant, by virtue of the power expressed in the order, the averments concerning the order, the representations made by the appellant, and the obtaining of the money thereby, may possibly show the commission of a crime by the appellant; but if a transfer, not of the property, but of the order or power to sell the property only was intended, it would seem to be quite doubtful if any offence is shown. The order given by Walburn to the appellant, as described in the indictment, it is clear, did not vest in the appellant the property in the corn, but simply gave him power to sell it for Walburn, that is to say, made the appellant Walburn's agent for that purpose. This agency he could not transfer to another. Morgan was bound, and is presumed to have known that such transfer could not be made, and, hence, had no right to put any reliance upon the representation of the appellant that it could be done, and when done would give him, Morgan, power to dispose of the property. So that, upon this view of the case, it was entirely immaterial whether the order was genuine or false, or whether the power conferred by it had already been fully exhausted.

The doctrine is familiar and fundamental, that the false pretence, token or writing must have been such as under the circumstances was calculated to mislead, and on which the injured party had a right to rely.

Assuming that the count charges a sale of the corn by the appellant to Morgan, is it good, and, if so, what offence does it charge?

Shaffer v. The State.

Section 27 of the act defining felonies, approved June 10th, 1852, 2 R. S. 1876, p. 436, reads as follows:—

“Sec. 27. If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretence, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of value; such person shall, upon conviction thereof, be imprisoned in the State's prison not less than two nor more than seven years, and fined not exceeding double the value of the property so obtained.”

The corresponding and only like provision found in the act of 1881, defining public offences, R. S. 1881, p. 413, is as follows:

“Section 2204. Whoever, with intent to defraud another, designedly, by color of any false token or writing, obtains the signature of any person to any written instrument, or obtains from any person any money, transfer, bond, bill, receipt, promissory note, draft or check, or thing of value; and whoever sells, barter, or disposes of, or offers to sell, barter, or dispose of, any transfer, bond, bill, receipt, promissory note, draft or check, or any thing of value, knowing the signature of the maker, indorser, or guarantor thereof to have been obtained by any false pretence,—shall be imprisoned in the State prison not more than seven years nor less than two years, and fined in any sum not more than one thousand dollars nor less than ten dollars.”

While the latter enactment embraces important matter not contained in the former, and changes the penalty in respect to the amount of the fine which may be assessed, it is to be observed that in the first clause of the latter section the phrase “or any false pretence” is omitted; so that under this section there can be no prosecution for obtaining any money, goods, transfer, note, bill or the like, by false pretence, unless it consist of a false token or writing, nor at all, indeed, unless section 27 is in that respect unrepealed.

The important question thus suggested, we do not find it

Shaffer v. The State.

necessary now to decide ; nor do we indicate any opinion upon it. Conceding for the argument that in respect to false pretences, as distinguished from a false writing or token, the former law is still in force, we are of the opinion that neither count of the indictment charges sufficiently an offence under either section 2204, or under the supposed unrepealed part of section 27.

It is claimed on behalf of the State, and denied by the appellant—assuming that the transaction charged was a sale of the corn—that, the power conferred by Walburn's order having been already exhausted in the making of the alleged prior sale to another, the writing became invalid for further use, and, as used in accomplishing the sale to Morgan, was a false writing in the sense of section 2204, and consequently that the charge is well laid under that section.

To reach this conclusion, however, as it seems to us, involves the extension of the words *false writing* beyond their ordinary and natural meaning, so that the offence would consist not simply in the use of a false writing or token, but would also embrace an unwarranted or false use of writings or tokens conceded to be genuine.

There may perhaps be precedents or analogies in the common law for such a construction, but it is hardly admissible under a system in which crimes and their definitions are purely and exclusively statutory. Besides being contrary to the established rule for the construction of criminal statutes, it is easy to see that the construction contended for might lead to conclusions certainly not contemplated by the Legislature, whereby the criminality of an act would consist not in the intentional use of a false document, but in the misconstruction and improper use of a writing of undisputed genuineness.

The writing in question, as described in the indictment, was not of a doubtful character, and, having already sold the corn by virtue of it, appellant, it is not to be presumed, could have supposed that it gave him power to sell again ; and when he

Shaffer v. The State.

represented that he had the right, under the order, to sell the corn to Morgan, and thereby obtained money, as charged, he committed the offence of obtaining money by false pretence, under section 27, if in force, as supposed, and not by false token or writing, under section 2204—that is, assuming that the count shows a sale of the corn by the appellant to Morgan—the false pretence being the representation that he had authority, under the writing, to make the sale. The writing was genuine, but the representation was clearly false. It was the representation of a material existing fact, and, therefore, such as the purchaser had a right to rely on.

But, as already indicated, we are unable to say that the count under consideration charges a sale of the corn by the appellant to Morgan, rather than a mere transfer of the order; and, on account of this uncertainty, if for no other reason, the motion to quash should have been sustained.

The evidence fails entirely to show a sale, and does show an assignment of the order, with an agreement or understanding that Morgan should sell the corn, repay himself the sum of \$5 loaned to the appellant, and, deducting the further sum of \$5 which the appellant owed him, should account to the appellant for the remainder of the price of the corn.

Excepting that the evidence in the record does not show that the appellant had made a sale to another *before* the transaction with Morgan, it does tend to support the charge made in the second count in the indictment. The second count of the indictment details the same general facts as those set out in the first count, and charges, as the gist of the offence, that "Shaffer falsely and feloniously represented that he could and would assign, and did then and there assign, said writing to the said Morgan, which would give him, the said Morgan, the right to sell the said lot of corn and receive the proceeds of the same, repay himself," etc., "and return the overplus, if any, to said Shaffer," etc.

It is clear that Morgan had no right to believe such an absurdity. The misrepresentation consisted in the miscon-

Beaty v. The State.

struction of an instrument, too plain to be misunderstood, and a misstatement of the effect of a transfer of it. If its character had been different, and its meaning uncertain, it could have made no difference, because, in reference to such matters every man must rely upon his own judgment, or resort to his legal adviser for instruction.

The judgment is reversed, with instructions to sustain the motion to quash each count of the indictment.

No. 10,172.

BEATY v. THE STATE.

CRIMINAL LAW.—Indictment.—Two or More Counts.—Verdict of Guilty on One Count.—Silence of Verdict.—Where, on an indictment of two or more counts, the defendant is found guilty as charged in one count, and the verdict contains no finding as to the other counts, this silence of the verdict is equivalent to an express acquittal of the offences charged in such other counts.

SAME.—Discretion of Trial Court.—Supreme Court.—Whether or not the State should be compelled to elect on which one of two or more counts the defendant will be prosecuted, is a question for the decision of the trial court in its discretion, and will not be reviewed by the Supreme Court.

SAME.—Embezzlement.—Felonious Intent.—Where one is charged with the embezzlement of money or property entrusted to him, an intent to feloniously appropriate it, at the time of the appropriation, is essential; and if the appropriation is made upon the belief, honestly entertained by the defendant, that he has lawful title or right to the money or property, the act is not criminal.

SAME.—Jurisdiction.—Under section 1581, R. S. 1881, where property taken in one county, by embezzlement, has been brought into another county, the jurisdiction of the offence is in either county.

From the Marion Criminal Court.

L. Jordan, W. N. Harding and A. R. Hovey, for appellant.

D. P. Baldwin, Attorney General, W. W. Thornton and J.

B. Elam, Prosecuting Attorney, for the State.

Beaty v. The State.

Howk, J.—The indictment in this case contained three counts. In the first count, the appellant was charged with stealing “one beast of the mule kind,” of the value of \$100, of the personal goods and chattels of Herman H. Lindemann and John F. Lindemann. In the second count, he was charged, as the agent and employee of the said Lindemanns, with the embezzlement of “a certain beast of the mule kind,” of the value of \$100, of the personal goods and chattels of the said Lindemanns; and in the third count he was charged, as such agent and employee, with the embezzlement of certain moneys, of the amount and value of \$100, the proceeds of the sale of “a certain beast of the mule kind,” of that value, of the personal goods and chattels of the said Lindemanns.

To this indictment the appellant, on arraignment, pleaded that he was not guilty, as therein charged. The issues joined were tried by a jury, and a verdict was returned, in substance, as follows: “We, the jury, find the defendant guilty as charged in the third count of the indictment, and that he be fined in the sum of one dollar, and be imprisoned in the State’s prison for a period of two years.” Over the appellant’s motion for a new trial, and his exception saved, the court rendered judgment on the verdict.

The only error relied upon by the appellant’s counsel for the reversal of the judgment below, is the decision of the circuit court in overruling the motion for a new trial.

Before proceeding to the consideration and decision of any of the questions presented and discussed by the appellant’s counsel, it may be properly noticed that the verdict of the jury is entirely silent as to the issues joined upon the first and second counts of the indictment. It has often been held by this court, that such a verdict is equivalent to an express verdict, that the defendant is not guilty of the felonies charged in those counts of the indictment not mentioned in the verdict. *Bittings v. State*, 56 Ind. 101; *Bonnell v. State*, 64 Ind. 498; *Lamphier v. State*, 70 Ind. 317. In this court, therefore, the

Beaty v. The State.

third count of the indictment may be properly regarded as the only indictment against the appellant.

In this third count, it was charged in substance, that the appellant, on the 15th day of June, 1881, at and in the county of Marion, was then and there the agent and employee of Herman H. Lindemann and John F. Lindemann, for the purpose of selling and trading a certain beast of the mule kind, of the value of one hundred dollars, of the personal goods and chattels of the said Lindemanns, and the appellant, as such agent and employee received and took into his possession, as it was his duty so to do, said beast of the mule kind, and, in pursuance of such agency and employment, did sell and trade the said beast of the mule kind, and did receive and take into his possession, as the purchase-money of said beast of the mule kind, divers moneys, bills, notes, legal tender treasury notes, national bank notes, gold and silver coins, copper and nickel coins, amounting in all to one hundred dollars, and of the value of one hundred dollars, a more particular and accurate description of which said moneys, etc., is to said jurors unknown, and for that reason can not be given, all of which said moneys, etc., were then and there of the aggregate value of one hundred dollars, and current money of the United States, and of the moneys, personal goods and chattels of the said Lindemanns. And the appellant at and in the county of Marion, and on said 15th day of June, 1881, as such agent, did then and there unlawfully, feloniously, knowingly and fraudulently purloin, secrete, embezzle and appropriate to his own use all of said moneys, etc., current money as aforesaid and of the value aforesaid, so received as aforesaid, as the agent of the said Lindemanns, contrary to the form of the statute, etc.

The first point made by the appellant's counsel in argument is based upon the refusal of the court below to require the prosecuting attorney to elect on which counts of the indictment the State would proceed and rely; whether the State would rely on the first and second counts or on the first

Beaty v. The State.

and third counts. The record shows that the appellant's motion for an order requiring such an election was made after the State had introduced its evidence and rested, and before the offer of any evidence by the appellant; that thereupon the prosecuting attorney represented to the court that the different counts in the indictment covered the same facts, and were not distinct crimes, but the same criminal acts charged in different ways as a precaution against variance, and that the court then overruled the appellant's motion. There was no available error, we think, in this ruling of the court. It is settled by the decisions of this court that the subject of appellant's motion is a matter wholly within the discretion of the trial court, and that the decisions of that court on such a motion will not be reviewed by this court. *Mershon v. State*, 51 Ind. 14; *Snyder v. State*, 59 Ind. 105; *Lamphier v. State*, *supra*.

The appellant's counsel earnestly insist that the doctrine of the cases cited is not applicable to the case in hand, but we think otherwise. In the early case of *McGregg v. State*, 4 Blackf. 101, the court said: "Where there are two or more counts for apparently distinct felonies, as there legally may be in many instances, it can not be a matter of course, as the plaintiff in error contends it is, for the defendant to compel the prosecutor to elect on which single count he will go to trial. If that were the case, it would at once render nugatory the established and legal practice of inserting several counts in an indictment for felony. There could be no possible use in inserting several counts, if the defendant could, in effect, have them all but one struck out of the indictment. The truth is, the different counts in an indictment for felony, are usually drawn with a view to one and the same transaction; and the object of inserting several counts is, that some one of them may be found, on the trial, to be in accordance with the evidence. This is a legitimate object, and the court will never, in such a case, interfere with the proceeding."

In the case at bar, the prosecuting attorney told the court

Beaty v. The State.

in effect, in response to appellant's motion, that the different counts in the indictment were drawn with a view to one and the same transaction. Upon this representation, we are of the opinion that the court committed no error in overruling the appellant's motion to require the prosecuting attorney to elect on which counts of the indictment the State would proceed and rely.

The appellant's counsel next complain of the refusal of the court to give the ninth instruction asked by appellant, in substance, as follows:

"Though the jury may believe that the moneys alleged to have been embezzled did come into the possession of the appellant, as the agent of the Lindemanns, and was by him put to his own use, the same being the Lindemanns' property; still, if the evidence showed that the appellant, at the time, did not intend to embezzle such moneys, but intended to return the same to the owners thereof, then the jury should acquit him on the third count of the indictment."

If it were conceded that this instruction stated the law correctly, it would seem to us that there was no available error in the court's refusal to give it, for the reason that its subject was fully and clearly covered by the fourth instruction, given by the court of its own motion and in its own language. In this latter instruction, the jury were told, in substance, that, in the event of their acquitting the appellant of the charge of larceny, in the first count, then they must determine whether or not he was guilty of embezzlement, as charged in either the second or third count of the indictment. "In such cases, an intent to feloniously appropriate the property, at the time of the appropriation, is essential, and if the appropriation is made upon the belief, honestly entertained by the accused, that he has lawful title or right to appropriate it, the act is not criminal." We think the closing sentence of this instruction states the law upon the point under consideration, more clearly and accurately than it is stated in the instruction asked by appellant, and we do not doubt that the latter instruction

Beaty v. The State.

was properly refused. Indeed, while we think that the intent of the appellant, at the time of his appropriation of the moneys in question, was a proper matter for the consideration of the jury, yet we can not agree that the instruction refused contained a true statement of the law in regard to such intention. If the appellant honestly intended, at the time of his use of such moneys, to return the same to the owners thereof, and if his conduct in relation thereto had been such as to show such intention on his part, he could hardly have been convicted of the embezzlement of such moneys; but, even if the instruction was otherwise unobjectionable, we would be obliged to hold that it was properly refused, on the ground that it was not applicable to the case made by the evidence.

For the same reasons, we think that the court did not err in refusing to give the jury the thirteenth and fourteenth instructions asked by the appellant. There is no substantial difference between these instructions and the ninth instruction already considered.

We are of the opinion, also, that the fifteenth and sixteenth instructions asked by appellant were correctly refused by the court. The evidence before the court and jury did not warrant the giving of these instructions, even if the statements of law therein were abstractly correct; but we do not think that they stated the law correctly, even as abstract propositions. Some complaint is made by appellant's counsel of the instructions given the jury by the court below; but a careful consideration of these instructions has led us to the conclusion that there is no error therein, of which the appellant can complain.

Finally, it is insisted by the appellant's counsel, that the evidence failed to show that the court below had jurisdiction of the offence; but upon this point we think that counsel are mistaken. The evidence showed, it is true, that the mule was sold, and the purchase-money received, by the appellant, in Shelby county; but it is also true that, shortly after the sale, and before he left the State, he came into Marion county,

 Bragg v. Stanford et ux.

having in his pocket a part of such purchase-money. This was shown by the appellant's own testimony. In such a case, it is provided in section 8 of the criminal code of 1881 (sec. 1581, R. S. 1881), that "the jurisdiction is in either county."

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

 No. 8951.

BRAGG v. STANFORD ET UX.

HUSBAND AND WIFE.—*Fraudulent Conveyance.—Pleading and Proof.*—The proof must support the averments of a pleading, and in an action by a creditor of the husband to set aside a conveyance to the wife as fraudulent, it being alleged that she paid nothing and held the title as a volunteer, the action fails if she is shown to have paid a part of the price with her own money.

SAME.—*Instruction.—Evidence.—Possession and Ownership.*—In an action to subject property held by the wife to the payment of her husband's debts, it was not error to refuse to instruct, that when the husband is permitted by the wife to exercise control and ostensible ownership, and to hold himself out to the world as the real owner of her personal property, the law will in respect to creditors treat the property as his.

SAME.—*Personal Property.—Title.—Possession.—Presumption.*—The general creditor who has acquired no specific interest in a chattel, as by buying or taking a lien upon it, has no right, to the prejudice of the true owner, to deal with the one in possession on the presumption of his being the owner. Possession does not constitute or conclusively show the ownership of a chattel.

SAME.—*Preference of Creditors.*—The rule, that a failing debtor may prefer one creditor over another, applies to a husband indebted to his wife.

SAME.—*Promissory Note.—Consideration.—Evidence.—Gift and Advancement.*—When a father gives money to his daughter, intended as an advancement, and at the same time takes the promissory note of her husband for the amount, for the purpose of evidencing the advancement, parol evidence is admissible, in a suit to subject her real estate, in which said money was invested, to the payment of her husband's debts, to show the facts. The effect is to show that the note was given without consideration.

From the Hamilton Circuit Court.

83	234
143	677
82	234
165	520

Bragg v. Stanford et ux.

H. Dailey, W. N. Pickerill, A. F. Shirts, G. Shirts and W. R. Fertig, for appellant.

J. Stafford, — *Boyd, D. Moss and R. R. Stephenson*, for appellees.

WOODS, J.—Complaint by the appellant to subject certain real estate, of which the appellee Mary Stanford held the title, to the payment of a judgment obtained by the appellant against the appellee Thomas Stanford.

The title had been in said Thomas at the time when the appellant had obtained her judgment, but was subject to the lien of a prior mortgage, which was afterwards foreclosed, and the land sold upon the decree to William Havens, who transferred his certificate of purchase to said Mary Stanford, to whom at the end of the year allowed for redemption from the sale the sheriff made the deed now brought into question.

The complaint contains no charge of fraud against Mrs. Stanford, nor knowledge of the alleged fraudulent purpose of her husband, but alleges that the money paid to Havens in consideration of the transfer to her of the sheriff's certificate of sale was the husband's money, and was so invested by him for the purpose of putting it beyond the reach of his creditors.

The verdict was for the defendants, and the only error assigned is the overruling of the motion of the appellant for a new trial.

The evidence shows beyond any reasonable doubt that Mrs. Stanford was not a mere volunteer in the transaction complained of, but that a material part, if not, indeed, the whole, of the price paid to Havens for the assignment of the certificate, was her money, and this being so the verdict is right, and ought not to be disturbed, even though it should appear that error had intervened in the record. There is, however, no error available to the appellant which could be deemed material, even if the evidence were less clear.

The appellees, called on behalf of the appellant, testified that within three or four years before the transfer of the cer-

Bragg v. Stanford et ux.

tificate of sale to Mrs. Stanford, she received money of her father, which she entrusted to the hands of her husband, who employed it in buying and selling cattle and horses, kept on the land in question, where they lived, this being done upon an understanding between them that the stock so purchased belonged to the wife, or, at least, the proceeds thereof to the extent of keeping her money intact; but in this connection there was some evidence that the husband used his own and his wife's money promiscuously, without rendering any account or giving any note to the wife for her share, and that his agency for her, and her interest in the stock, were not known to the public.

The money derived from the sale of this stock was delivered by the husband to the wife as hers, for the purpose of enabling her to purchase, and she accordingly paid it to Havens as a part of the consideration for the transfer of, the certificate of sale. And upon the basis of this evidence, the appellant asked an instruction to the effect that when the husband is permitted by the wife to exercise control and ostensible ownership, and to hold himself out to the world as the real owner of her personal property, the law will, in respect to creditors, treat the property as his, "and will not permit the rights of creditors to be prejudiced by such secret lien or equity in favor of the wife."

This is stated too broadly, and is not the law. The general creditor, who has acquired no specific interest in the particular property, as by buying it, or taking a lien upon it, has no right, to the prejudice of the real owner, to deal with the one in possession on the presumption of his ownership. Possession does not constitute, and is by no means conclusive evidence of, ownership, as is illustrated by every conditional sale, contract of bailment, hiring, agency or the like, whereby the owner parts with possession, and yet retains the title to his property, as against all general creditors of the vendee, agent or bailee. *Reissner v. Oxley*, 80 Ind. 580. If, however, the doctrine of the instruction were conceded, it would hardly

Bragg v. Stanford *et ux.*

be applicable, and could not affect the result in this case. If the husband became the owner of the property, then he was the debtor of his wife for the money received of her, and for the purpose of paying that debt, with interest, in preference to all others, had a right to use the proceeds of the sale of the property. *Brookville Nat. Bank v. Kimble*, 76 Ind. 195. It was therefore immaterial whose the property was, as in either view, the money became hers, and as such was paid to Havens.

The evidence further shows that for the purpose of obtaining the sum to be paid to Havens, Mrs. Stanford procured her father's promise to let her have \$1,000, and sent her husband to bring it. He obtained the money and at the same time gave to the father his own note for the amount. Over the objection and exception of the appellant, the court permitted the appellees to give testimony tending to show that the sum so obtained was an advancement to Mrs. Stanford upon her interest in her father's estate, and that the note so given was not given for the money, but solely as an evidence of the advancement, and that it was afterwards so treated in the settlement of her father's estate; and the court accordingly instructed the jury that if the money was given by the father to the daughter as an advancement upon her share in his estate, and was not intended as a loan to the husband upon his note, the money became hers, and when paid to Havens was a payment by her.

The court committed no error in these particulars. The admission of the evidence was not in violation of the rule which forbids the introduction of parol evidence to contradict or vary the terms of a writing. It is competent, as respects the application of this rule, to show what the consideration of a written contract was, or that it had no consideration; and such was the effect of the evidence permitted in this instance. Once it was shown that the money obtained was a gift to the wife, it followed that the husband's note was without consideration, and could have served no purpose, unless to evidence the advancement. That such evi-

Rous, Administrator, v. Walden.

dence is admissible, see *Sherman v. Sherman*, 3 Ind. 337; *Norman v. Norman*, 11 Ind. 288; *Fankboner v. Fankboner*, 20 Ind. 62; *Beals v. Beals*, 20 Ind. 163; *Tillotson v. Race*, 22 N. Y. 122.

If there is any inconsistency, as counsel claim there is, between this instruction and another which the court gave at the instance of the appellant, it is because the latter was more favorable to the appellant than it ought to have been, for which, of course, the appellant could not complain. There is however no inconsistency in this respect between the instructions. The one asked by the appellant goes upon the hypothesis that the money obtained of the father was a loan to the husband upon his note of hand; and the other, that the money was a gift to the daughter, which constituted no consideration for the note. The legal conclusion deduced from one of these hypotheses, in respect to the issue to be determined, was necessarily the opposite of the deduction from the other, and it was not inconsistent to so instruct.

Judgment affirmed, with costs.

No. 8907.

ROUS, ADMINISTRATOR, v. WALDEN.

STATUTE OF LIMITATIONS.—*Sale of Personal Property.*—*Account.*—Where a sale of personal property is made and nothing is said as to the time and manner of payment, the law implies a payment in cash at the time of delivery, and as the cause of action for the price of the property then accrues, the statute of limitations commences to run from that time, and a suit for the value of the property after the expiration of six years from the sale is barred by the statute.

From the Switzerland Circuit Court.

J. B. McCrellis and ——— *Pleasants*, for appellant.

W. R. Johnston and *F. M. Griffith*, for appellee.

BEST, C.—This action was brought by the appellee against

Rous, Administrator, v. Walden.

Solomon Froman, before a justice of the peace, to recover a balance alleged to be due him for six head of cattle sold and delivered by him to Froman. Upon appeal to the circuit court, an answer of three paragraphs was filed: First. A general denial; Second. The statute of limitations of six years; and, Third. Payment. A reply of denial was also filed. Afterward the death of the defendant was suggested, and the appellant substituted. A trial was had, and a verdict returned for the appellee; over a motion for a new trial, judgment was rendered upon the verdict.

The error assigned is, that the court erred in overruling the motion for a new trial. Various reasons were embraced in this motion; among others, it was averred that the verdict was not supported by sufficient evidence, and was contrary to law. The evidence is in the record, and we are of opinion that the verdict, under the issues, should have been for the appellant. This suit was commenced on the 28th day of August, 1879, and we are clearly of the opinion that the cause of action sued upon accrued more than six years before that time, as is shown by the undisputed evidence in the case. The only evidence in the case, other than that introduced to prove when the suit was commenced, was the testimony of Nathan Walden, as follows: "I know the parties; I am a son of the plaintiff; was acquainted with Solomon Froman in his lifetime; Solomon Walden sold Froman six head of cattle; was to give him \$25 apiece; don't know who was present when the sale was made; Mr. Froman came to my house and told me that he had bought my father's cattle at \$25 per head; he bought six head." Upon cross-examination, he said: "This was in the last of September or first of October, 1872."

This was the entire testimony to show the defendant's liability, or to fix the time when the cause of action accrued. It is evident that the witness was not present at the sale, and that the decedent's admission was the only evidence of any liability. If it is conceded that the decedent's admission that he had bought the appellee's "cattle at \$25 per head" implies

Clark *et al.* v. Middlesworth *et al.*

that he had not paid for them ; it does not imply that any credit was given, and hence the cause of action accrued at once. When a sale is made, and nothing is said as to the time or manner of payment, the law implies that the payment is to be made in cash at the time of delivery, and if the admission establishes any liability, it shows that the cause of action accrued at the time the sale was made. Benjamin Sales, sections 617 and 706.

As the sale was made nearly seven years before the suit was commenced, the action was barred by the statute. If a credit in fact was given, and expired within six years before the commencement of the suit, the duty rests upon the appellee to prove it. From such an admission, the law will not imply it. For these reasons, we think the motion for a new trial was well taken, and for the error in refusing it the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to sustain appellant's motion for a new trial.

No. 9202.

CLARK ET AL. v. MIDDLESWORTH ET AL.

WILL.—Construction.—Widow.—Election.—Estate for Life.—Conveyance.—The testator devised to his wife "all my property, real and personal, during her life, and at her death, if anything should remain, the same to be divided among my heirs at law." He left surviving him his wife and children and grandchildren. The wife afterwards executed a deed of conveyance of the whole of the real estate, for an adequate price, with covenant that she was lawfully seized of the same in fee simple.

Held, that the wife took an estate for life with power to sell and convey the whole estate in fee.

Held, also, that the execution of the deed by her was an election to take

89	240
124	29
82	240
135	658
136	141
82	240
139	15
139	72
89	240
141	186
82	240
146	484
82	240
154	400
155	154

Clark *et al.* v. Middlesworth *et al.*

under the will, and not under the law giving her only a third in fee, and was such an execution of the power to convey as to vest in the purchaser the whole estate in fee.

TENANT FOR LIFE.—Remainder-Man.—Taxes.—Burden of Proof.—A tenant for life is required to preserve the remainder by paying taxes and incumbrances, if the income of the estate is sufficient therefor; but, in a suit by the remainder-man against the tenant for life for failure of the latter in that respect, the burden of proof to show that the income of the estate was sufficient is on the plaintiff.

From the Elkhart Circuit Court.

J. M. Vanfleet, A. S. York, D. York and L. W. Vail, for appellants.

R. M. Johnson and E. G. Herr, for appellees.

MORRIS, C.—The appellants brought this suit against the appellees to recover the value of a lot in the town of Goshen, in Elkhart county. The cause was put at issue and submitted to the court for trial. At the request of the parties, the court found the facts specially, and stated the conclusions of law thereon. The appellants properly excepted to the conclusions of law as stated by the court. The error assigned involves the correctness of the conclusions of law stated by the court below.

The findings of fact and conclusions of law are as follows: "The court finds, that in the year A. D. 1854, Aaron B. Clark died testate, being at the time the owner in fee, and in possession, of lot No. 124, in Goshen, in the county of Elkhart and State of Indiana; that the will of said decedent, a copy of which is attached to and made a part of this finding, was duly probated in this county, and is as follows:

" 'I, Aaron B. Clark, being of sound mind and memory, do make and publish this as my last will and testament, hereby revoking all former wills.' I hereby will and bequeath and devise all my property, real and personal, to my wife, Mary A. Clark, during her life, and, at her death, should anything remain, the same to be divided among my heirs at law. I hereby appoint my said wife the executrix of this my last will.

Clark et al. v. Middlesworth et al.

“Given under my hand and seal, this 2d day of May, A. D. 1854. A. B. CLARK. [Seal.]”

“That said testator left surviving him his widow, Mary A. Clark, and children and grandchildren, who are named as plaintiffs in this case; that, on the 18th day of November, 1863, said Mary A. Clark executed to one John Arthur, a conveyance of said real estate, a copy of which is made a part hereof, and is as follows:

“This indenture witnesseth that Mary A. Clark, of St. Joseph county, Indiana, in consideration of \$1,400 to her paid by John Arthur, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell and convey to the said John Arthur, heirs and assigns forever, the following real estate in Elkhart county, and State of Indiana, and described as follows, to wit: Lot one hundred and twenty-four (124) in the original plat of the town of Goshen, in said county and State, together with all the privileges and appurtenances to the same belonging, to have and to hold the same, to the said John Arthur, heirs and assigns forever. The grantor, heirs and assigns hereby covenanting with the grantee, heirs and assigns, that the title so conveyed is clear, free and unencumbered; that she is lawfully seized of the premises aforesaid, as of a sure, perfect and indefeasible estate of inheritance in fee simple; and that she will warrant and defend the same against all claims whatsoever.

“In witness whereof, the said Mary A. Clark has hereunto set her hand and seal this 18th day of November, 1863.

“MARY A. CLARK. [Seal.]”

“That, on April 26th, 1864, said Arthur conveyed the undivided one-half of said lot to Henry L. Bailey; that said Bailey, on November 28th, 1864, conveyed undivided half of said lot to James Upson; that, on September 5th, 1865, said Arthur conveyed the other undivided half of said lot to James Upson; that, April 26th, 1866, said Upson conveyed said lot to David M. Shoup; that, on December 1st, 1866, said Shoup conveyed the said undivided one-half of said lot

Clark et al. v. Middlesworth et al.

to Helen A. Ward, who, February 1st, 1867, joined her husband in conveying the same to John Bigler, who, on January 13th, 1868, conveyed the same to Thomas Smurr, who, on September 15th, 1869, conveyed the same to Marcus M. Barber; that, on June 12th, 1870, the sheriff of Elkhart county, Indiana, in consummation of a sale made upon an execution against said Shoup and Smurr, conveyed the undivided one-half of said lot to Daniel Hill, and, on June 20th, 1870, in consummation of a sale duly made on an execution against said Smurr and said Barber, said sheriff conveyed said lot to said Daniel Hill, whereby said Hill became and was possessed of all the title and interest conveyed by the said deed of Mary A. Clark to said John Arthur; that, on August 11th, 1871, said Hill conveyed said lot to the defendant Isaac M. Middlesworth, said conveyance being made subject to the taxes of the year 1871; that said Middlesworth went into actual possession in September, 1871, and occupied said lot until May 22d, 1872, when he conveyed to Truman Hunt, subject to the taxes of 1872; that, on November 16th, 1874, in consummation of a sale upon execution against said Middlesworth and one Abner L. Brown, said sheriff conveyed said lot to said Truman Hunt, who, on August 9th, 1876, quitclaimed the same to Seth Hunt.

“In 1871, one undivided half of said lot stood upon the tax duplicate in the name of Joseph D. Arnold, who had purchased the same at a tax sale for the taxes of 1869 and 1870, the same having been assessed in the name of David M. Shoup for those years; and the tax thereon for the years 1871 and 1872, the same being assessed in the name of said Arnold, not having been paid, the same was again sold at tax sale for said taxes, to wit, February 10th, 1873, and the certificate of said sale was duly assigned by the purchaser to Jonathan R. Mather, and thereafter said half of said lot was assessed to and stood for taxation in the name of said Mather. In the years 1873 and 1874, the other half of said lot was assessed and taxed in the name of Daniel Hill, and, the taxes for said years having

Clark et al. v. Middlesworth et al.

become delinquent, the same was sold February 8th, 1875, to said Jonathan R. Mather, and thereafter assessed and taxed in his name; and thereafter, in due time, there having been no redemption from said sales, the county auditor executed a tax deed to said Mather, in consummation of said sales; and thereafter, to wit, at the September term of this court for the year 1877, said Mather instituted a suit to quiet his title under said deeds, and made parties defendants thereto the said Mary A. Clark and the parties to this suit, both plaintiffs and defendants, and caused them all to be duly served with process or publication of notice, and, upon final hearing, to wit, on the 28th day of March, 1878, the court adjudged that the said deeds were invalid as conveyances, but found and adjudged that there was due said Mather the sum of \$229.05, which was declared a lien upon said lot, and it was duly adjudged and decreed that the said lot be sold for the payment of said lien and costs; that the said Mary A. Clark died April 30th, 1878; that, on June 12th, 1878, the said Mather procured an order of sale to be issued on said decree, by virtue of which the sheriff of said county duly advertised and sold said lot on July 6th, 1878, to said Mather, for the sum of \$166.49, and, there having been no redemption from said sale, did, on July 7th, 1879, execute to said purchaser a conveyance of said lot. Said lot was, at the time it was so sold and conveyed to said Mather, of the value of \$1,500.

"On June the 7th, 1876, said Middlesworth recovered a judgment at law in the Elkhart Circuit Court against said Truman Hunt for \$2,000, on which execution was duly issued and levied upon said lot, and by virtue thereof a sale of said lot made to said Middlesworth, and the said Middlesworth having assigned a one-fourth interest in his certificate of purchase to the defendants Johnson, Osborn and Herr, who were partners under the firm name of Johnson, Osborn & Herr, the sheriff at the end of the year for redemption, to wit, on the 26th day of November, 1877, executed to said Middlesworth a deed for the undivided three-fourths of said

Clark et al. v. Middlesworth et al.

lot, and on the 25th day of February, 1878, to said Johnson, Osborn & Herr, a deed for the undivided one-fourth thereof; and from the dates of their said deeds respectively, until July 7th, 1879, when the sheriff conveyed to said Mather, said Middlesworth, and Johnson, Osborn & Herr had the possession and control under their said deeds of said lot, but derived no rents exceeding \$10 therefrom. The deeds of conveyance hereinbefore mentioned were all duly recorded and, except as otherwise expressly shown, were warranty deeds, made in the statutory short form. Said Middlesworth paid the taxes on one-half of said lot for the year 1871, and offered to pay and tendered to the treasurer of said county the taxes assessed against the other half of the lot for that year, but the same was refused by the said officer on the ground that the same had prior thereto been sold for taxes theretofore assessed against the same, and was then assessed for taxation in the name of the purchaser of said tax sale.

“CONCLUSIONS OF LAW.

“1st. Upon the foregoing facts the court finds that the defendants, jointly or severally, are not liable to the plaintiffs for the value of said lot, so sold and conveyed to said Mather upon said decree and order of court.

“2d. The plaintiffs can recover nothing by this suit.”

Some of the appellants were the children and others the grandchildren of the testator, Aaron B. Clark. They claim that the finding of the court shows that the widow of said testator, Mary A. Clark, elected to take under his will, and that by its terms she took but a life-estate in his property, without any power of disposition, and that they, as devisees or heirs took the remainder in fee. They further insist that if the will of Aaron B. Clark gave to Mary A. Clark a life-estate in the real property of the testator, with a power of alienation, the power was never executed by her as to the lot in question. They also claim that it was the duty of the said Mary A. Clark, as tenant for life of said lot, and those

Clark et al. v. Middlesworth et al.

who, from time to time, succeeded to her estate, to pay and keep down all taxes and charges upon said lot during her life, and that if said lot has been lost to them through a failure on their part to discharge this duty, the tenants for life are liable to them, as remainder-men, for the value of the lot; that the said Mary A. Clark and the appellees, who became owners of her life-estate, failed during the continuance of said life-estate to pay the taxes lawfully assessed on said lot, in consequence of which the same was sold for taxes and lost to the appellants.

It is insisted, on the other hand, that the facts found do not show that Mary A. Clark ever elected to take under the will of Aaron B. Clark; that she never did so elect, but took one-third of the lot under the law as his widow; that she was not, therefore, in any way bound to pay the taxes on the two-thirds of the lot which went by descent to the appellants. But they further contend that if Mrs. Clark did elect to take under the will, she took a life-estate coupled with a power of alienation, and that her warranty deed conveying said lot to John Arthur was a valid execution of the power. The appellees also contend that if the above positions are not tenable, the judgment below was right, for the reason that the tenants for life are not found to have received any income from the lot with which to pay the taxes thereon, and for this reason the facts found furnish no sufficient data upon which any judgment for damages can rest.

We will consider the points contested in the order above stated.

✓We think it quite clear that the will of A. B. Clark gave to his widow, Mary A. Clark, a life-estate in said lot, and that it also gave her, by the clearest implication, a power to dispose of the same. The words, "and at her death, should anything remain," are senseless and without meaning, unless the testator intended that the tenant for life might, prior to her death, dispose of the property devised to her for life. The words clearly show that he must have contemplated this at the

Clark *et al.* v. Middlesworth *et al.*

time, and, therefore, have intended it. *Paine v. Barnes*, 100 Mass. 470; *Andrews v. Bank of Cape Ann*, 3 Allen, 313.

The appellants insist that the above words do not confer upon the tenant for life a power to convey, and refer us to the case of *Blanchard v. Blanchard*, 1 Allen, 223. The words, in the case referred to, from which the power to sell and convey was attempted to be inferred, were, "all the property * that may be left at the death of my wife," etc. The court held that the words meant the property left after the life-estate given to the wife had terminated. But as, by the will, personal as well as real estate had been given to the wife for life, the court was inclined to admit that the words might imply a power to dispose of the personal, but not of the real estate. No such construction can be given to the words, "should anything remain," found in the will of Aaron B. Clark.

Do the facts found by the court show that Mary A. Clark elected to take under the will of her husband, Aaron B. Clark?

The court finds that Aaron B. Clark died testate, the owner in fee of the lot, the value of which is in controversy; that he gave it by his will to said Mary A. Clark for life, with power to dispose of the fee. It is further found by the court, that on the 18th day of Nov., 1863, Martha A. Clark sold, and by warranty deed conveyed, said lot to John Arthur for \$1,400, covenanting that she was lawfully seized of the same as of a sure, perfect and indefeasible estate of inheritance in fee simple. Obviously, Mrs. Clark intended to convey the whole lot in fee, not one-third of it. She doubtless believed that under the will she had become the owner of the fee, and not the owner of a mere power to dispose of the fee. She knew that she had no right to more than one-third of the lot, if she took under the law and not under the will. This conveyance, if made under the will, was a positive, irrevocable election, in view of the facts found by the court, to take under the will. We think she clearly intended to convey the estate which she supposed had been devised to her by Aaron B. Clark. The

Clark et al. v. Middlesworth et al.

following cases, cited by the appellants' counsel, bear upon the question: *Bradfords v. Kents*, 43 Pa. St. 474; *Cox v. Rogers*, 77 Pa. St. 160; *Tilton v. Nelson*, 27 Barb. 595.

We have examined the cases referred to by counsel for the appellees, and think they are not in conflict with the conclusion reached. The case of *Wetherill v. Harris*, 67 Ind. 452, is unlike this. The court, after stating that unless the widow is shown to have elected to take under the will by some positive, affirmative act, indicating her intention to elect, she will be presumed to hold under the law, says: "Having made the mortgage as executrix, it can not be held that Mrs. Hensley is bound personally." She acted as executrix, and what she did as executrix would not constitute an election.

Did the warranty deed executed by Mrs. Clark to John Arthur convey the fee in the lot devised to her? Can this deed operate as a valid execution of the power devised to Mrs. Clark? Upon this point the authorities are not quite agreed.

The case of *White v. Hicks*, 33 N. Y. 383, and cases there cited, would seem to favor the views of the appellees, that the execution of the deed by Mrs. Clark to Arthur might operate as a valid execution of the power, so as to vest in Arthur the title to the lot in fee. On the other hand, in the case of *Dunning v. Vandusen*, 47 Ind. 423 (17 Am. R. 709), and the cases there cited, it is held that such a deed does not, of itself, indicate any intention on the part of the grantor to execute the power. On the one side, it may be urged that the whole title to the lot was intended to be transferred; that this could only be done by executing the power, and hence it may be inferred that the grantor intended, by the execution of the deed, to execute the power. But it may be said, with much more force, as it is in the case last cited, that the deed indicates an intention on the part of the grantor to convey her title, and nothing else; that, by the language of her covenants, she affirms that she "is lawfully seized of a sure and perfect title," etc., which clearly evinces an intention to transfer her own title, and not an intention to dispose of the estate of another.

Clark *et al.* v. Middlesworth *et al.*

Mrs. Clark believed, at the time she made the deed, that the lot belonged to her; and it was her interest in it, and not the interests of others, which she intended to convey. We are disposed to adhere to the rule as held in the case of *Dunning v. Vandusen*. Counsel for the appellee insist that, as in the case just cited the tenant for life was authorized to dispose of the fee at her death only, that case is unlike the present, and that; for this reason, the rule should be different. But the question, as to whether the power has been executed, did not depend upon the time at which the acts, claimed to constitute the execution, were performed. The decision did not turn upon or involve a question of time. In addition to the cases cited in *Dunning v. Vandusen*, we refer to *Bingham's Appeal*, 64 Pa. St. 345; *Pease v. Pilot Knob Iron Co.*, 49 Mo. 124.

Assuming that it was the duty of Mary A. Clark, as tenant for life, and of those who, from time to time, succeeded to her interest in the lot, to pay and keep down the taxes on the same, what is the measure of the liability of the tenant for life who neglects to discharge this duty to those in remainder? It would seem that such liability should be measured by the loss and injury resulting from the failure of the tenant to the remainder-man. The tenant for life owes it to the remainder-man to keep down the taxes, and if, through his failure to perform this duty, the estate in remainder is sold, destroyed or wasted, why may he not be required to make the loss good? If, through the failure of the tenant to pay the taxes, if the income of the estate is sufficient to discharge them, the estate is sold and conveyed to another beyond the power of the remainder-man to recover it, it is, as to him, destroyed, wasted and the inheritance gone, and the tenant should pay for the lot.

In the case of *Wade v. Malloy*, 16 Hun, 226, it was held that where a tenant for life failed to pay taxes and to keep down the interest on an existing encumbrance, in consequence of which the estate was sold, the tenant in default

Clark et al. v. Middlesworth et al.

was liable to those in remainder for the loss sustained. The court says:

"One thing is certain, the defendant by his neglect has caused the disherison of the plaintiff. True, he has not done so by any of the acts or omissions usually named in the books as instances of waste. But is that important? Is it material by what act or omission the destruction of the inheritance is brought about? The result is what causes the injury and damage, and not the mode or manner of its accomplishment. The defendant has been guilty of a great wrong towards the plaintiff, much akin to permissive waste, and the result has been the entire loss of her interest in the property. She ought to have a remedy." The above is the only case that we have been able to find bearing directly upon the above question. We think it decides the law.

It appears from the findings of the court, that one-half of said lot was sold in 1873, for the taxes accrued on said lot for 1869 and subsequent years; that at that time one Hunt owned the life-estate in said lot; that one Jonathan R. Mather became the owner of the certificate of purchase, and, the portion of the lot sold not having been redeemed within two years, Mather obtained from the proper officer a deed for the same. In 1875, said Mather bought at tax sale the other half of said lot for the taxes of 1873 and 1874, and, no redemption having been made within two years, he obtained a deed for the same in 1877.

Mather instituted a suit at the September term, 1877, of the Elkhart Circuit Court, against Mary A. Clark and all the parties to this suit, asking that his title to said lot be quieted. The court, at the March term, 1878, adjudged that Mather's deeds were invalid, but found that there was due him for the taxes paid \$229.05, declared the same a lien on the lot and ordered it to be sold to pay the same and costs. On the 6th of July, 1878, the lot was sold upon an order duly issued to enforce Mather's lien, for \$166.49, to said Mather, who, at

Clark et al. v. Middlesworth et al.

the expiration of a year, no one having redeemed from said sale, obtained a sheriff's deed for said lot.

Mary A. Clark died April 30th, 1878, at which time the life-estate ceased, and the appellants became the owners in fee of the lot, subject to the lien in favor of Mather.

It does not appear from the findings of the court that the rents and income of the lot were sufficient to pay the ordinary taxes upon the same, nor that the lot was in any way productive. For anything that appears in the findings, it might have been, during the life of Mary A. Clark, entirely unproductive. It is true that the court finds that the rents received by Middlesworth, Johnson, Osborn and Herr, who were in possession of the lot from 1877 until 1879, did not exceed \$10; but whether any part of this sum accrued before the death of Mary A. Clark is not found. From the facts found, we can not say that the lot was productive. We can not, by presumption, add to the facts found by the court.

If the lot was entirely unproductive, was it the duty of the tenant for life to improve it and make it sufficiently productive to pay the taxes and charges upon it, or, failing so to do, was she bound, as such tenant, to pay the accruing taxes and charges? We think she was not. She might, it is true, have erected buildings upon the lot, and thereby made it productive, but had she erected buildings, however permanent and beneficial they may have become to those in remainder, she could neither have charged their cost upon the estate nor upon those in remainder. We think she was not bound to improve the lot in order to render it productive. The tenant for life, as well as the remainder-man, must be regarded as the object of the donor's bounty, and to hold her bound to expend money for the protection of the interests of the remainder-man, beyond the income of the property, would be unjust and opposed to the presumed intention of the donor. *Brooks v. Brooks*, 12 S. Car. 422.

The court finds that Aaron B. Clark died in possession of said lot. From this, the appellant insists that it must be in-

Clark *et al.* v. Middlesworth *et al.*

ferred that Mr. Clark was, at his death, in possession. But both might have been legally in possession of the lot, without actually occupying it. In the case of *Wade v. Malloy*, *supra*, the income of the property was alleged and proven and shown to be sufficient to keep down the interest and taxes. It should have been shown in this case. We think the court did not err in the conclusions of law stated.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of appellants.

WOODS, J., was absent.

ON PETITION FOR A REHEARING.

MORRIS, C.—Counsel for the appellant insist that the court erred in its opinion in this case, in holding:

1. That the tenant for life was not bound for the payment of taxes on the real estate so held beyond the income of such estate.

2. In holding that in this case the burden of showing that the income of the estate was sufficient to pay the taxes and charges upon it, rested upon the appellants.

Aaron B. Clark, by his will, devised a lot in Goshen, Elkhart county, Indiana, to his wife, Mary A. Clark, for life, with remainder to the appellants. The taxes on the lot were allowed to become delinquent, and it was duly sold for their non-payment, and, through the sale, the title, during the life of Mary A. Clark, passed beyond the reach of the appellants, and became lost to them. The suit is brought to recover from the appellees, as the grantees of Mary A. Clark, the value of the estate in remainder thus lost to the appellants.

We held that the tenant for life, as well as those in remainder, must be regarded as the object of the testator's bounty; that, if the property was unproductive, she was not bound to pay out of her other means the accruing taxes and charges upon the estate in order to save the remainder for the appellants; that such a requirement would be opposed to the presumed intention of the testator.

Clark *et al.* v. Middlesworth *et al.*

1st. The appellants say that the taxes on the estate are charged by the State to the tenant for life, and that the tenant is, therefore, under obligation to pay them. This may be, but if the State sold the lot, and from the proceeds received the taxes, the obligation to the State is discharged. The question is not between the State and the tenant for life, but between the latter and the remainder-man. In such case, if the remainder-man desires to save the estate, he must pay the taxes. We are satisfied with our ruling on this point.

2d. Was it for the appellants in this case to show that the property was sufficiently productive to keep down and pay the taxes, and that therefore the property was wrongfully allowed to be sold, and the remainder lost to them? or was it for the appellees to show that the property was not productive, and that for that reason they were excusable?

Appellants insist that, *prima facie*, it is the duty of the tenant for life to pay the taxes. But we hold that the duty is not absolute, but conditional; that it is dependent upon the productive capacity of the estate; that if the property is unproductive, the duty does not exist; that, therefore, the remainder-man can not complain of the failure of the tenant for life to pay the taxes, without showing that the estate was productive, and that, for this reason, the burden as to this question was upon the appellants. The appellants say:

"We think it is a universal rule of law, without exception, that where one person sues another for failing to perform a duty imposed by law or by contract, and the plaintiff proves the facts from which the duty *prima facie* arises, and the failure to perform it, the burden is on the defendant to show an exception or excuse, if he have one."

This proposition may be admitted, but the law only imposes the duty upon the life tenant to pay the taxes where the property held for life is productive. One of the facts from which the duty to pay the taxes arises is the productiveness of the estate. Counsel also say that "It is generally the duty of a city to keep its streets in safe condition if it has funds or

Clark *et al.* v. Middlesworth *et al.*

means so to do ;" that the absence of funds will be a sufficient excuse, etc. But, in such cases, the law, which need not be averred or proved, confers upon the city ample means for procuring the necessary funds, and, therefore, presumes the existence of such means. In the absence of such a law, no such presumption would arise.

In the only case which we have been able to find, supporting the right of the appellants to recover for the loss of their estate in remainder for the non-payment of taxes, the rental value of the property was alleged and proven by the plaintiff, and it was only upon the fact that the income was shown to be sufficient to discharge the taxes and interest upon encumbrances, that the plaintiff was held to be entitled to recover. *Wade v. Malloy*, 16 Hun, 226. We think the burden of showing that the life-estate was productive rested upon the appellants, and that the petition for a rehearing should be overruled.

It was held in this case, with some doubt expressed in the opinion, that the warranty deed of Mary A. Clark to John Arthur was not an execution of the power of alienation which, by the will of Aaron B. Clark, accompanied the devise to her for life. It may not be improper to say here that a subsequent examination of the authorities has convinced us that the deed made by her to Arthur was a valid execution of the power. It appears that Arthur paid Mrs. Clark, for the lot, the sum of \$1,450, its fair cash value. This somewhat distinguishes the case from *Dunning v. Vandusen*, 47 Ind. 423. In support of the conclusion here stated, see the following cases: *Funk v. Eggleston*, 92 Ill. 515; *Andrews v. Brumfield*, 32 Miss. 107; *White v. Hicks*, 33 N. Y. 383, and cases there cited; *Amory v. Meredith*, 7 Allen, 397; *Hall v. Preble*, 68 Maine, 100; *Bishop v. Remple*, 11 Ohio State, 277; *Campbell v. Johnson*, 65 Mo. 439.

PER CURIAM.—Petition overruled.

Scearce v. Gall.

No. 9332.

SCEARCE v. GALL.

82	255
156	408

CONTRACT.—*Promise to Pay Debt of Third Person.*—A written promise, on a new and valuable consideration, to pay the debt of a third person, is valid, although there is no release of the original debtor, and may be enforced by the creditor.

SAME.—*Consideration.*—The assignment of a sheriff's certificate of the sale of land under a decree of foreclosure is a sufficient consideration for a promise by the assignee to pay a junior judgment lien on the land.

SAME.—*Performance in Manner Requested.*—A party procuring performance in a given manner can not complain thereof.

SAME.—*Payment in Notes.*—*Action for Recovery of Money.*—Where one undertakes to pay in notes and refuses to execute them, he may be sued in the first instance for the recovery of money.

SHERIFF'S SALE.—*Description in Notice.*—*Answer.*—*Reply in Avoidance.*—A. assigned to B. a sheriff's certificate of the sale of land, on which C. held a junior judgment lien, B. agreeing in consideration of the assignment to pay C.'s judgment. In a suit by C. to enforce payment, an answer by B. that the sale was void because of an insufficient description in the notice is avoided by a reply that under a second sale the defendant acquired a perfect title and had long been in possession of the land.

From the Hamilton Circuit Court.

E. H. Granger, for appellant.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellee.

ELLIOTT, J.—The material allegations of the appellee's complaint may be thus summarized: On the 16th day of November, 1875, he recovered judgment against Peter Sterne for \$373.25; that, on the 30th day of March, 1878, the appellant acquired a mortgage lien on the real estate of Sterne, but junior to that of appellee's judgment, which was still in force; that Amos Haverstick was the owner of a mortgage upon part of the real estate which was the senior lien; that Haverstick purchased the mortgaged premises at a sale made upon a decree foreclosing his mortgage, and received a certificate; that the appellant purchased from Haverstick the certificate, and, in consideration of the sale to him, agreed to pay the appellee's judgment. A written contract was executed by Haverstick and the appellant, and is made part of the complaint.

Scearce v. Gall.

The promise made by the appellant for the benefit of the appellee is a valid one, and is enforceable by him. A promise by one person to another, for the benefit of a third, may be enforced by the latter.

Appellant's counsel argue that the complaint is bad because it does not show a release of the original judgment debtor. Counsel have misconceived the theory upon which the complaint rests. The contract declared on is not a verbal but a written one, and the question whether there was or was not a novation, is wholly immaterial. A written promise, founded upon a new and valuable consideration, to pay the debt of a third person, is valid, although there is no release of the original debtor. In the present case, the consideration of the promise made to Haverstick, for the benefit of the appellee, was the assignment of the sheriff's certificate, and this was sufficient, irrespective of any other.

Where a party undertakes to execute notes in payment and refuses to do so, he may be sued at once. It is not necessary to sue to compel the execution of the notes, but the action may be brought in the first instance for the recovery of money. If appellant had desired to avail himself of the right to make payment in notes, he should have executed them at the time fixed by the contract.

• The written contract provides that the certificate shall be assigned to appellant, and the complaint alleges that, at his request, it was assigned to him and one Martha J. Passwaters jointly. It is argued that this does not show performance. The argument is without merit. A party who procures performance in a given manner is not in a situation to complain of the other for having complied with his request.

There was no error in sustaining the demurrer to the third paragraph of the answer. If it was good, no harm resulted, for all the matters stated were embraced in other paragraphs.

The appellant alleged, in his answer, that the property was not sufficiently described in the notices of sale published by the sheriff, and that the sale was, therefore, void. Appellee

Morgan *et al.* v. Board of Commissioners of Rush County.

replied that the mistake in the notices was not discovered until after the year for redemption had expired; that, immediately upon the discovery of the mistake, the appellant procured another certified copy of the judgment and decree, and caused a second sale to be made; that, under the second sale, the appellant acquired a perfect title, and had long been in possession of the land. We regard the reply as sufficient.

There was no warranty by the appellee, and the assignment of the certificate created no liability against him. It may well be doubted whether there would be any liability if no title at all could have been acquired; but, however this may be, it is quite clear that the appellant, having secured title and being in possession under it, is in no condition to repudiate his contract.

Judgment affirmed.

No. 9254.

MORGAN ET AL. v. BOARD OF COMMISSIONERS OF RUSH COUNTY.

SOLDIERS' BOUNTY.—*Burden of Proof on Claimant.*—The board of commissioners of Rush county offered a bounty to volunteers enlisting in the military service of the United States, the offer to cease whenever the quota of the county was full.

Held, in an action by a claimant to recover the bounty, that the burden of proof was upon him to show that he enlisted and was credited to the county before the quota had been filled.

From the Rush Circuit Court.

C. Cambern, for appellants.

W. A. Cullen and *B. L. Smith*, for appellee.

WOODS, J.—The appellants each claimed of the appellee a sum alleged to be due him for enlistment to the credit of the county as a soldier in the war of the Rebellion. Their claims

Morgan *et al.* v. Board of Commissioners of Rush County.

were consolidated, and submitted to the court below, upon an agreed statement of the facts, under the 389th section of the code.

The statement of facts shows that on the 10th day of November, 1863, the board of commissioners of Rush county adopted and entered of record an order, of the tenor following, to wit:

"1st. That there shall be paid out of the county treasury to every man who shall volunteer for three years, or during the war, in Rush county, and for whom said county shall be credited, * * the sum of \$200.

"2d. It is further ordered that said sum of \$200 shall be paid by the county treasurer to each volunteer personally, or to his order, upon the order of the county auditor, who is authorized to issue his order therefor whenever the volunteer shall have been mustered into the service of the United States, and the certificate of the mustering officer, that the volunteer has been mustered into said service, shall be sufficient to authorize the auditor to issue his order for said sum to each volunteer: *Provided* always, that said bounty shall cease whenever the quota of said county shall be full, or until the 4th day of January, 1864, if the quota shall not have been made up before that time."

And at a special session in February, 1864, the board of commissioners made a further order, of the tenor following:

"The board agree to pay to 155 men, or so many as may be necessary to clear the county from the draft under the late call, the sum of \$200 each, to be paid to veterans who re-enlist and are credited to the county, and also to those who enlist under the former call for 300,000, and have not received their bounty; and it is expressly ordered that the *bona fide* citizens of the county are to have the preference before outsiders are paid, and the said bounty is to be paid under the same rules and regulations that the former bounty was paid, and the orders made at that time are made a part of this order."

That pursuant to said orders the claimants enlisted in Com-

Morgan et al. v. Board of Commissioners of Rush County.

pany K, 123d Regiment, Indiana Volunteers, and were duly mustered into the service on the 3d day of March, 1864, and were on said day duly credited to said county, and on that day each of them made a demand for said bounty upon the auditor of said county, but the auditor refused to pay them or any of them, and they have each never received any bounty from said county.

That the quota of the county was 365 men, and up to March 2d, 1864, there were 355 men who had been duly mustered into the service and credited to the county and were entitled to the bounty under said orders; and on the 3d day of March, 1864, the same day the plaintiffs were mustered in, the quota of the county lacked ten men of being full; that on that day there were sixty-seven men mustered into said service and credited to said county, of which number fifty-four were paid said bounty, the plaintiffs being among the thirteen men unpaid; that the fifty-four men demanded and received their bounty before any demand was made by the plaintiffs.

"The court," according to the recital of the record, "having heard the evidence and argument of counsel, and being fully advised, finds for the defendants, to which the plaintiffs object and except," and judgment was given accordingly.

The case presented is clearly distinguishable from *Board, etc., v. Wood*, 39 Ind. 345, and from *Moore v. Bogrd, etc.*, 59 Ind. 516, upon which counsel for the appellants place some reliance.

Upon the facts as stated, we do not perceive that the court could have reached a different result.

The burden was upon the appellants to show that they were entitled to the proffered bounty. Unless they enlisted and were credited to the county before the quota of the county was full, they were not entitled to it, and the agreed statement of the facts does not show that they enlisted in time; indeed, the reasonable inference from the facts stated is that they did not. The quota was filled on the day on which they

Sample v. Cochran.

enlisted, and was then filled by others who demanded and received their bounties before the plaintiffs made any demand; and as the plaintiffs made their demand on the same day as the others who were paid, it may fairly be inferred that they were behind in making the demand, because behind in receiving their certificates of muster and credit. But, however this may be, the burden of proof being upon them, the conclusion of the court was necessarily against them.

Judgment affirmed, with costs.

No. 9147.

SAMPLE v. COCHRAN.

PROMISSORY NOTE.—*Principal and Surety.*—*Release of Surety.*—*Lien.*—*Married Woman.*—It is the duty of the payee of a note upon which there is a surety to hold all securities he has from the principal of the note for the benefit of the surety; and if he releases a lien upon property of greater value than the amount of the note, such release discharges the surety, though the principal be a married woman and not bound by the note.

From the Clark Circuit Court.

P. H. Jewett, — *Jewett and C. L. Jewett*, for appellant.

BEST, C.—This suit was brought upon a note of \$100, dated December 27th, 1877, due two years after date, made by the appellant and one Sarah C. Sample to the appellee.

The appellant filed an answer of two paragraphs. The first was a general denial, and the second was as follows:

“The defendant says that said note is signed by defendant and Sarah C. Sample, and that he executed said note with said Sarah C. Sample, and as her surety, at the request and procurement of said Sarah C. Sample, and the plaintiff, under the following representations and promises made by them to him, that is to say: The plaintiff and said Sarah C. Sample told defendant that plaintiff had sold to said Sarah C. Sample, a

Sample v. Cochran.

house and lot in the city of Jeffersonville, Indiana, and the plaintiff was to [and] had retained a lien on said house and lot for the payment of the note which the defendant was about to sign; that said lien had been retained for the purpose of preventing any loss or damage to the person who should become surety on said note, and that if said Sarah C. Sample failed to pay said note, the plaintiff would resort to an enforcement of said lien for the satisfaction of said debt. He says that said house and lot are still held and owned in fee simple by said Sarah C. Sample, and worth \$800, and unencumbered, and that said house and lot are described as follows: * * * * * That said Sarah C. Sample is now a married woman, and was at the time of the execution of said note; that by a fraudulent combination between the said Sarah C. Sample and the plaintiff, the plaintiff, without consideration, released said lien; the said Sarah C. Sample was not made a party to this suit, and the defendant prays that the plaintiff be compelled to make said Sarah C. Sample a party defendant hereto, and that she be required to proceed to enforce her lien on said house and lot, and for all other proper relief."

A demurrer for the want of facts was sustained to this paragraph of the answer. The appellant also filed a cross complaint against the appellee and Sarah C. Sample, alleging, substantially, the same facts as were averred in the second paragraph of his answer. Each of the defendants thereto demurred for the want of facts, and these demurrers were sustained. The cause was tried, and judgment rendered for the appellee. The rulings upon the several demurrers are assigned as error. The action of the court in sustaining the demurrers of the appellee is not alluded to in the brief of appellant, and is, therefore, waived.

The ruling upon the demurrer of Sarah C. Sample presents no question, as she is not a party to this appeal. There is, therefore, no available error in the ruling of the court upon the demurrers to the cross complaint.

Sample v. Cochran.

The ruling upon the demurrer to the second paragraph of the answer was erroneous. The substance of its averments is, that the appellant was the surety of Sarah C. Sample in the execution of the note; that the payee held a lien upon a house and lot of the value of \$800 to secure the payment of said note, and, after its execution, she released her lien. This released the surety. It is the duty of a payee of a note upon which there is a surety, to hold all securities he has from the principal in the note, and if he releases such securities, the surety upon the note will be released to the extent of the value of the security released. *Holland v. Johnson*, 51 Ind. 346; *Brandt Suretyship*, section 370.

The value of the lien released exceeded the amount due upon the note, and hence the facts averred constituted a bar to the action.

The paragraph in question was general, and was subject to a motion to make more specific, as the nature of the lien was not stated; but this objection can not be taken by demurrer. We have not been favored with a brief from the appellee, and do not know why the paragraph was deemed insufficient by the court below. The fact that Sarah C. Sample was a married woman, and was not herself bound by the note, did not change the appellant's relation to the debt. He was her surety, and the release of any security held by the payee against Sarah C. Sample, would release the appellant as though she had also been bound by the note. This paragraph of the answer was good, and, for the error in sustaining the demurrer to it, the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at appellee's costs, with instructions to overrule the demurrer to the second paragraph of the answer, and for further proceedings.

 Hervey v. Parry *et al.*

No. 8952.

HERVEY v. PARRY ET AL.

82	860
180	172
82	863
152	181

VENDOR AND PURCHASER.—False Representations.—Answer.—Duplicity.—Motion to Separate into Paragraphs.—Practice.—To a complaint to foreclose a mortgage, it was answered, in a single paragraph, that the mortgage debt was for the difference in an exchange of farms with the mortgagee, and that, to induce the contract, the mortgagee made certain false representations concerning his farm (which were relied on), as to the quantity of timber land, the quantity of cleared land, the situation and capabilities of a cranberry marsh, the productiveness of the farm; that, as to the timber land, it was less valuable by \$500, as to the cranberry marsh, it was less valuable by \$500, and as to productiveness as a fruit farm, it was less valuable by \$1,000, than it was represented, and that, by reason of false representations as to the ordinary produce of the land, the defendants were damaged \$400. It was also averred that \$100 was allowed and paid to the mortgagee for a growing wheat crop, which he was to take care of and did not, whereby it was lost, to the damage of defendants \$300, and that he carried away and sold the farm bell, to the damage of the defendants \$75.

Held, that the answer was good on demurrer.

Held, also, that a refusal to require the separation of the answer into three paragraphs was available error.

PLEADING.—Harmless Error.—When the general denial is in, there is no error in striking out another paragraph which is merely its equivalent.

CHANGE OF VENUE.—Jurisdiction.—Presumption.—Practice.—When a change of venue has been taken from the judge, and another judge appointed takes jurisdiction of the cause, under whose order it is continued, and on the twelfth day of the next term, and before the regular judge, the party who obtained the change is permitted, over objection, to withdraw his application therefor, and the cause is subsequently tried before the regular judge, the record being silent as to the presence of the judge appointed, it will be presumed that he had abandoned the cause, and there is no error.

VERDICT.—Special Findings.—Interrogatories to Jury.—The refusal to render judgment on special findings, notwithstanding a general verdict, is not available error, when the record does not show that the court submitted the interrogatories to the jury.

From the Marshall Circuit Court.

G. R. Chaney, J. D. McLaren and A. C. Capron, for appellant.

H. Corbin and O. M. Packard, for appellees.

Hervey v. Parry et al.

BICKNELL, C. C.—This was a suit for foreclosure by the assignee of a mortgage against the mortgagors and a junior encumbrancer.

Matilda Parry and one Swanback exchanged farms. Charles F. Parry, the husband of Matilda, was her agent in making the exchange. The Parrys gave Swanback two notes to boot, and secured the notes by a mortgage; the notes and mortgage were assigned by Swanback to the appellant, who brought this suit thereupon against the appellees.

The junior encumbrancer was defaulted; no question arises as to him.

Parry and wife answered jointly, admitting the execution and assignment of the notes and mortgage, but alleging false and fraudulent representations of Swanback, relied on by them, as to the productiveness of his farm, and the quantity of timber land, and the number of acres cleared, and the situation and capabilities of a certain cranberry marsh, and that, by the false representations as to the cleared land and as to the timber land, the farm was less valuable than as represented by \$500; that, by reason of the false representations as to the cranberry marsh, the land was less valuable than as represented to the amount of \$500; that, by reason of the false representations as to the productiveness of the farm as a fruit farm, the land was less valuable by \$1,000, than it was represented to be; and that, by reason of the false representations as to the ordinary farming produce of the land, the appellees were damaged \$400.

The answer also avers that the Parrys were to pay, as part of the price of the land, and did pay to Swanback, \$100 for twenty acres of growing wheat, which Swanback was to take care of and did not do it, whereby the wheat was destroyed and the appellees were damaged thereby \$300, and that Swanback, after the sale, carried off and sold the farm bell, to their damage \$75. The appellees offer, in this answer, to set off the above damages to the amount of the notes sued on, and they demand a judgment for costs.

Hervey v. Parry et al.

It will be observed that this answer contains three distinct defences, viz.: The false representations, the breach of contract as to the wheat, and the price of the farm bell.

And it will be observed, as to the false representations, that, although the notes were given for part of the price of the land, it is not stated what that was, nor what the real value of the land was, nor what its value would have been had the representations been true.

A demurrer to this answer for want of facts sufficient, etc., was overruled. A motion by plaintiff that the defendants separate their answer into three paragraphs was overruled.

The plaintiff filed a reply in three paragraphs, to wit:

"1st. The general denial.

"2d. That the defendants, by their agent, represented to the plaintiff that said notes were 'gilt edged,' and would be paid at maturity, and that there was no set-off or other defence to them; and that thereby the defendants are estopped, etc.

"3d. That said representations were made after the bargain had been concluded, and were made at the request of the defendants to enable them to sell the land or borrow money upon it; wherefore they are estopped," etc.

This third paragraph of reply was struck out. The defendants then filed an affidavit for a change of judge, which was granted, and the Hon. Daniel Noyes, judge of the 32d Circuit, was appointed in place of Judge Keith, and he accepted the appointment, and took jurisdiction of the cause, and ordered the same to be continued at the defendants' costs. At the next term of the court Judge Keith being upon the bench, and the record not showing that Judge Noyes was absent, or had in any way lost or abandoned his jurisdiction of the cause, the appellees were permitted by Judge Keith, over the objection and exception of the plaintiff, who appeared specially for that purpose, to withdraw their affidavit and application for a change of judge; and, Judge Keith having thus assumed jurisdiction, the plaintiff, again appearing specially, filed a demurrer to the jurisdiction of said judge,

Hervey v. Parry et al.

which demurrer was overruled. The issues were tried by a jury, who returned a verdict for the defendant, together with interrogatories and their answers thereto, as follows:

"1st. Was C. F. Parry acting as the agent of Mrs. Matilda Parry in the negotiations between herself and Swanback? Ans. Yes.

"2d. Did C. F. Parry visit the land, and make an examination of the same, before the execution of the deeds? Ans. Yes.

"3d. Was anything done by Swanback at the time C. F. Parry was on the farm to prevent Parry from making a full and careful examination of it? Ans. No.

"4th. Did C. F. Parry, after examining the farm receive information that the farm was not as good a farm as had been represented to him, and that he should 'keep his eyes peeled?' Ans. Yes.

"5th. Were there not verbal representations made by Swanback as to the products of the farm substantially the same as those contained in the written statements? Ans. Yes.

"5½. Had not C. F. Parry learned that the verbal representations were untrue? Ans. Yes.

"7th. Did not C. F. Parry have good reason to know before the execution of the deed by Swanback, that a portion of the representations put in writing by Swanback, as to the products of the farm, was not true? Ans. No.

"8th. Had not C. F. Parry, before the execution of the deed by Swanback, come to the deliberate conclusion that there was something radically wrong about the farm, and that it was not capable of producing the amount of fruit products stated in the written statement? Ans. No.

"9th. Had not all the terms of the exchange of lands, as to the amount of boot money to be paid by the Parrys, been agreed upon before the Parrys asked for the written statement? Ans. Yes.

"10th. Were not the written statements procured partially for the purpose of assisting the Parrys in getting a loan of money on the land as security? Ans. No.

Hervey v. Parry et al.

"11th. Was Swanback at any time notified by the Parrys that they intended to rely on the statements he made as to the products of the farm? Ans. Yes.

"12th. Did Swanback at the time he executed the written statements know, or had he been informed, that defendants were intending to rely on the statements as an inducement to their completing the exchange of lands? Ans. Yes."

The plaintiff moved for judgment upon the answers to the interrogatories, notwithstanding the general verdict, which motion was overruled.

The plaintiff moved for a new trial for several reasons, of which the first was irregularity in the proceedings of the court by which the plaintiff was prevented from having a fair trial before a judge having jurisdiction of this cause. The motion for a new trial was overruled.

The plaintiff also moved in arrest of judgment for want of jurisdiction in the court, and because the answer did not state facts sufficient to constitute a defence to the action. And this motion was overruled. Judgment was rendered upon the verdict and the plaintiff appealed.

The errors assigned are as follows:

"1st. The court erred in overruling the demurrer to the answer.

"2d. The court erred in overruling the motion that the answer be separated into paragraphs.

"3d. The court erred in striking out the third paragraph of the reply.

"4th. The court erred in permitting the appellees to withdraw their application for a change of venue, after the cause had been assigned to Judge Noyes, and he had taken jurisdiction thereof, and rendered a judgment in said cause.

"5th. The court erred in overruling the appellant's special plea or demurrer to the jurisdiction of Judge Keith, in said cause after the same had been assigned by him to Judge Noyes, on the appellees' affidavit and motion for a change.

"6th. The court erred in overruling the appellant's motion

Hervey v. Parry et al.

for judgment in his favor upon the answers to the interrogatories, notwithstanding the general verdict.

"7th. The court erred in overruling appellant's motion for a new trial.

"8th. The court erred in overruling appellant's motion in arrest of judgment."

As to the first error assigned, the appellant claims that the answer was insufficient, because the representations were so extravagant that no sensible man ought to rely upon them, and that they were, at most, mere enhancements of value, upon which no purchaser had a right to rely. It is true, that, as between buyer and seller, mere recommendations or depreciations of property amount to nothing, and mere expressions of opinion by either party amount to nothing; in such cases the purchaser must take care of himself, and a false affirmation by the seller as to a matter plainly within the observation of the purchaser, and which by the use of ordinary diligence he might have ascertained, will not support an action or a defence. The law gives no indemnity against the consequences of indolence or folly, or a careless indifference to the ordinary and accessible means of information. 2 Kent's Com., p. 485; *Kennedy v. Richardson*, 70 Ind. 524.

But the averments of the answer in the case at bar were not mere affirmations of value nor expressions of opinion; the averments, especially as to the quantity of the timbered land and the quantity of the cleared land, were of matters presumably within the knowledge of Swanback, and not presumably within the knowledge of the Parrys, and they had a right to rely on such representations, and were not bound to ascertain the quantities by survey.

In *Kennedy v. Richardson*, *supra*, an answer was held sufficient in which the representation was that the land contained 665 acres, when in fact it contained only 636 acres. In a case like this, where the answer states precisely the damages sustained by the false representations, it is not a valid objection

Hervey v. Parry *et al.*

that the answer fails to state the price of the land, or what its value would have been had the representations been true.

There was no error in overruling the demurrer to the answer.

But the court erred in refusing to require the answer to be separated into paragraphs; it contained several defences. Practice Act, section 56, clause 3; *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297.

There was no error in striking out the third paragraph of the reply; it was equivalent to a denial, and the general denial was already in.

The fourth and fifth errors relate to the action of the court in assuming jurisdiction of the cause, over the objection of the appellant, after a change of judge had been granted, and after the new judge had taken jurisdiction.

The same cause is also stated as the first cause for a new trial.

It appeared that the new judge had accepted his appointment, and had assumed jurisdiction, and had continued the cause until the next term, and that on the twelfth day of the next term, the appellees, over the objection of the appellants, were permitted by the circuit judge, to withdraw their affidavit and application for a change of judge, and that, on the thirty-second day of the term, the cause was tried before the circuit judge, over the objection of the appellants. The appellants claim that this action of the circuit judge, without anything in the record to show that the new judge had lost his jurisdiction, was unwarrantable. But this court is of opinion that the fair presumption is, that the new judge had failed to appear up to the twelfth day of the term, and had abandoned the cause. Then it would have been proper for the circuit judge to appoint another judge; but the necessity for that was waived by the withdrawal of the application for a change of judge, and the subsequent trial of the cause before the circuit judge, in the absence of his appointee, on the thirty-second day of the term was right. *Singleton v. Pidgeon*, 21 Ind. 118; *Hutts v. Hutts*, 51 Ind. 581.

Belknap, Adm'r, v. Caldwell, Adm'r, et al.

The sixth error assigned, which alleges inconsistency between the verdict and the answers to the interrogatories, presents no question, because there is nothing in the record to show that the interrogatories were considered by the court or submitted to the jury by the court.

The circumstances under which alone a jury is authorized to find specially upon particular questions of fact, when they find a general verdict, are not shown by the record to have existed in this case. Practice Act, section 336; *Cincinnati, etc., R. W. Co. v. Bowen*, 70 Ind. 478.

As the cause must be reversed for the error of the court in overruling the appellant's motion to separate the appellees' answer into paragraphs, it is unnecessary to consider the other errors assigned.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellees, with instructions to the court below to sustain the appellant's motion that the answer of the appellees be separated into paragraphs, and for further proceedings.

No. 8769.

BELKNAP, ADM'R, v. CALDWELL, ADM'R, ET AL.

DECEDENTS' ESTATES.—*Trust and Trustee.*—*Life-Estate.*—*Remainder-Man.*—

A. having a life-estate in lands, united with B., the remainder-man, in conveying it. B. received \$1,200 of the purchase-money in cash, and took a note for \$800, payable to himself at the death of A., bearing annual interest at 6 per cent., payable to A. Afterwards, B. became liable to A. for half this interest, and paid it. B. died, and his administrator, in a report, stated that he was requested to hold \$400 assets of B.'s estate, as trustee for A., and to pay the interest annually to A., and prayed that that sum be not distributed. A. afterwards died.

Held, that the administrator of A. had no valid claim for the \$400 against the estate of B.

From the Clinton Circuit Court.

Balknap, Adm'r, v. Caldwell, Adm'r, *et al.*

J. N. Sims, for appellant.

J. U. Gorman, A. E. Paige and *S. O. Bayless*, for appellees.

FRANKLIN, C.—Appellant, as the administrator of Hannah Wilson, filed a claim against appellee Caldwell, as administrator of the estate of Joseph Pitman, and others, alleging that Caldwell, as such administrator, had in his hands some four hundred dollars, with the interest thereon, belonging to said estate of Hannah Wilson; and that the other defendants, as heirs of said Joseph Pitman, claimed an interest therein.

Issue was formed by a denial. Trial by the court, and a finding for defendants. Over a motion for a new trial, judgment was rendered for the defendants. The error assigned in this court is the overruling of the motion for a new trial.

The reasons assigned for a new trial are, that the finding of the court was not sustained by sufficient evidence, and was contrary to the evidence.

The facts as shown by the evidence are substantially as follows: The said Hannah Wilson, deceased, had formerly been the wife of one Calvin Pitman, who, on the 3d day of November, 1843, by his will, gave to his said wife, at his death, a life-estate in a certain described one hundred and twenty acres of land, and at her death remainder over to his son Charles, his daughter Susannah Fowler, and his daughter Rebecca De Witt, giving to each a certain portion thereof.

According to the copy of the will in the record the description of the lands in the remainder interests is all confused, the shares lapping over each other, and embracing lands not willed to the wife during her life. There is, doubtless, a mis-description of the lands in the remainder interests.

The date of the death of Calvin Pitman is not shown; but probate of his will was made November 18th, 1843.

Joseph Pitman died June 14th, 1866, and appellee Caldwell was appointed his administrator.

Hannah Wilson died May 16th, 1878, at the age of 89 years, and appellant was appointed her administrator.

Belknap, Adm'r, v. Caldwell, Adm'r, *et al.*

Joseph Pitman, by some means not shown by the record, appears to have become the owner of forty acres of the 120 acres of land willed to Mrs. Wilson during her life, and on the 27th day of June, 1856, he and his wife, with Mrs. Hannah Wilson, sold and conveyed the remaining eighty acres of said land to other parties, for the sum of \$2,000, \$1,200 of which was paid to Joseph, and a note was given for the balance \$800, the interest to be annually paid to Mrs. Wilson, and the principal, at her death, to be paid to Joseph, and a mortgage upon the premises was executed and properly recorded, to secure the payment of the interest to Hannah and the principal to Joseph.

Joseph was a son of the said Calvin Pitman and Mrs. Wilson.

The record does not show why Joseph and wife united with Mrs. Wilson in this sale and conveyance, or what interest or claim he had in or to the remainder interest in the land, or what became of the remainder interests of his brother Charles and his sisters Susannah and Rebecca, or why the \$1,200 was paid, and the principal in the \$800 note was made payable, to Joseph Pitman.

Mrs. Wilson continued to receive the \$48 interest on the \$800 note until the year 1863, when, in a transfer of lands, Joseph assumed the payment of half of said interest, \$24 per annum.

Appellee Caldwell had become the owner of a half interest in the eighty-acre tract of land, assuming the payment of half of the principal and interest of the \$800 note, and had annually paid to Mrs. Wilson the \$24 interest; also, Joseph's half after his death.

On the 28th day of March, 1863, Joseph Pitman entered on the record a release of the mortgage, and acknowledged satisfaction of the debt.

After Joseph's death and the appointment of appellee Caldwell as his administrator, Mrs. Wilson filed a claim against the estate for \$400, money loaned, and interest after March 30th, 1867, claim dated May 8th, 1867, which was verified by her.

Belknap, Adm'r, v. Caldwell, Adm'r, *et al.*

The record shows nothing about what was done with the claim, she having died about eleven years thereafter.

Appellee Caldwell, as such administrator, reported his doings in said estate at the October term of the common pleas court, 1867, and again at the February term, 1869, and again at the February term, 1870, in which last report he credits himself with: "Am't retained in trust for Hannah Pitman, \$400; for present distribution, \$436.41.

"The administrator would respectfully show the court that the above named Hannah Pitman" (the evidence shows that the said Hannah Wilson, after a divorce from Wilson, was known and went by the name of Hannah Pitman) "is the mother of Joseph Pitman, deceased; that, in the lifetime of decedent, he became obligated to his mother, the same Hannah, to pay her twenty-four dollars a year during her lifetime, that is to say, the interest at six per cent. on four hundred dollars during her natural life.

"The administrator would further show that it is the desire of the said Hannah as well as the heirs of decedent, that he become the custodian of said sum of four hundred dollars, and become the trustee to carry out the obligation of decedent aforesaid.

"He would further show that said four hundred dollars is at interest, and that he has regularly paid the interest to the said Hannah as it has become due; as shown by above report there is in his hands for distribution at present the sum of \$436.41; that all the debts are paid, and all the obligations collected or assumed. Wherefore he prays an order to make distribution in his hands of said above amount; that his administration and trusteeship be continued for the purpose aforesaid; that he report from time to time upon them as in a sound discretion he should, and, upon the death of the said Hannah, he report and make distribution of the four hundred dollars so held by him in trust as above stated. All

Belknap, Adm'r, v. Caldwell, Adm'r, *et al.*

of which is respectfully submitted." At the conclusion of which is the following memorandum: "No other report filed."

The record does not show that any of these reports were approved or acted upon by the court, or that the sound discretion of the administrator ever prompted him to further report.

The old lady, Mrs. Wilson, was very feeble, and, for the last twenty years of her life, unable to do anything, being afflicted with a cancer on her face, and was a very great charge, trouble and expense upon her children. The \$48 interest per annum was but a very small pittance toward her support. She may have been defrauded out of her property and home by her son, but, if so, it was so long ago, in 1856, that the statute of limitations would have long since run against the fraud. But we do not understand this cause of action to be based upon a charge of fraud in the original transaction, but upon a charge that appellee Caldwell had money in his hands belonging to and for the use and benefit of the estate which appellant represented. The claim is for the principal, \$400, and not for interest due at her death.

We do not think that the facts proven in this case show that the \$400 in the hands of Caldwell belonged to the estate of Hannah Wilson; that the facts only show she had a claim to the interest thereon up to the time of her death; and, as there is no allegation in the complaint, and nothing in the evidence showing that there was any interest thereon due at the time of her death, we think the evidence sustains the finding of the court below, and that the finding was not contrary to the evidence.

The court did not err in overruling the motion for a new trial. We find no error in the record.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

Belknap, Adm'r, v. Caldwell, Adm'r, *et al.*

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Since the petition for a rehearing was filed, the parties by their counsel have filed an agreement stating that, since this appeal was taken, appellee Caldwell has departed this life, and that John J. Caldwell has been appointed his administrator, and that his name be substituted for that of the deceased.

Appellant insists that the court erred in the original opinion herein in holding that the complaint was for a claim against Franklin D. Caldwell, as administrator of the estate of Joseph Pitman, instead of an individual claim against said Caldwell, and that the court erred in fixing the date of the senior Pitman's will in 1873, instead of 1843.

The error in relation to the date of the will is in appellant's counsel, and not in the opinion of the court. That states in figures as plain as can be made, that the will was executed on the 3d day of November, 1843, and probated on the 18th day of November, 1843.

Appellant's intestate received a life-estate in a certain eighty-acre tract of land, by the said will of her husband. She and her son, Joseph Pitman, united in a conveyance of said land on the 27th day of June, 1856, for the consideration of \$2,000; by agreement, \$1,200 of it was paid to Joseph, and a note given for \$800. The principal of the note was made payable to Joseph at her death, and the interest was made payable annually to her, which she annually received until the year 1863, when one-half of the \$800 was arranged between her and Joseph, leaving the other \$400 to stand under the same arrangement, and the interest thereon was thereafter received by her so long as she lived, as well as the interest on the \$400 arranged with Joseph.

Joseph died some time between 1863 and 1867, date not given; the widow died May 10th, 1878, as claimed by appellant, instead of May 16th, as stated in the opinion of the court; but the difference is not worth noticing. Appellant

Bristol v. Bristol, Administratrix.

was appointed administrator of the widow, and appellee Franklin D. Caldwell was appointed administrator of the estate of Joseph.

Caldwell, as such administrator, in 1870, charged himself with said \$400 in trust, the interest to be paid to the widow so long as she lived, and at her death the principal to be paid to the heirs of Joseph. This suit was brought to recover that \$400, making Joseph's heirs co-defendants, alleging that they claimed the money, or an interest therein. The right to the principal of this fund, at the death of his mother, was vested in Joseph and his heirs, ever since the year 1856; and this could only arise as a claim against his estate. There was no fraud charged in the transaction, and there was nothing in the complaint to make appellee Caldwell personally liable to pay the \$400. Hence, we think the suit was against him as administrator, and not against him in his individual capacity. If it was against him individually, the appellant would be in no better condition, for he certainly would not be liable individually for the payment of the \$400.

There was no error in the original opinion of the court. The petition for a rehearing ought to be overruled.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that John J. Caldwell, as administrator of the estate of Franklin D. Caldwell, be substituted as appellee, instead of Franklin D. Caldwell, and that the petition for a rehearing be and the same is in all things overruled, at the costs of appellant.

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No. 9273.

BRISTOL v. BRISTOL, ADMINISTRATRIX.

EVIDENCE.—*Declarations.*—*Decedents' Estates.*—In an action against an administrator, the declarations of the intestate, in his own favor, made in the absence of the plaintiff, are not admissible in evidence on behalf of the estate.

Bristol v. Bristol, Administratrix.

SAME.—*Supreme Court.—Practice.*—When a case has been tried and decided upon a given theory, and material error committed in the admission of evidence, the Supreme Court will not consider whether, upon another theory, the decision might be upheld, unless the conclusion is clear.

From the Marion Circuit Court.

H. J. Milligan, for appellant.

L. Ritter and *E. F. Ritter*, for appellee.

WOODS, J.—The appellant is administratrix of the estate of her deceased husband. She filed against said estate a claim; whereupon a son and daughter of the deceased and herself, who besides her, are the only heirs, were permitted by the court to appear and resist the claim. They accordingly filed an answer of general denial and of the six years' limitation.

Trial by the court, which found for the defendants and gave judgment accordingly.

The appellant insists, and it clearly appears, that the court erred in overruling her motion for a new trial.

The appellant gave evidence tending to show—though whether sufficient we do not decide—that certain real estate which in 1843 had been conveyed to her and her deceased husband jointly, the title having so stood until the death of the husband, was in fact her separate and individual property, and was so acknowledged and treated by the deceased, and that of the rents of that property the deceased had collected and used large sums, for which he was indebted to her at his death.

For the purpose of rebutting this evidence, the defendants—the children aforesaid acting as defendants—were permitted to testify and to introduce the testimony of other witnesses, concerning conversations had with the deceased, and concerning his declarations, made in the absence of the plaintiff.

This testimony was clearly incompetent. The declarations of the deceased were no more admissible than they would have been if the suit had been instituted against him personally while in life. A party's declarations are competent evidence

The State, *ex rel.* Stallard, v. White *et al.*

against him or his representatives, but can not be adduced by or in favor of either.

Whether the children, who appeared to resist the claim, were competent to testify in relation to matters which occurred before the intestate's death, it does not appear to be necessary to decide, as there is nothing in their testimony which has a material bearing and which it was competent to prove by any witness.

It is urged by the appellee that the error in admitting improper evidence is immaterial and harmless, because the evidence adduced in favor of the appellant fails entirely to make out a case on which she was entitled to recover anything. We can not, however, as at present advised, say that that is so, and are not content to affirm the judgment on that ground, nor do we care to anticipate the questions which may arise on another trial by entering upon a present consideration of them.

The judgment is reversed, with costs, and with instructions to grant a new trial.

No. 9986.

THE STATE, EX REL. STALLARD, v. WHITE ET AL.

PURDUE UNIVERSITY.—*College Secret Society.—Mandate.*—The board of trustees and faculty of Purdue University can not make membership in a Greek letter fraternity or other college secret society a disqualification for admission as a student in the university, or require, as a condition of such admission, that an applicant, who may be a member of such a society, shall sign a pledge to disconnect himself from such society during his connection with the university, and admission, refused for such cause, may be enforced by mandate against the trustees and faculty.

WOODS, J., dissents.

From the Tippecanoe Circuit Court.

J. R. Coffroth, T. A. Stuart, T. B. Ward, R. P. DeHart, C. E. Lake, J. S. McMillen and W. F. Severson, for appellant.

The State, *ex rel.* Stallard, *v.* White *et al.*

J. A. Stein, W. D. Wallace, H. W. Chase, F. S. Chase, F. W. Chase, G. W. Collins, R. P. Davidson, J. C. Davidson and D. P. Baldwin, for appellees.

NIBLACK, J.—This was an application by the State, on the relation of Samuel F. Stallard, against Emerson E. White, Harvey W. Wiley, David G. Herron, Langdon S. Thompson, Charles L. Ingersoll, Robert F. H. Weyher, John A. Maxwell, William F. M. Goss, Charles R. Barnes, Edward E. Smith, Edna D. Baker and Annie Peck, for a mandamus.

The complaint averred that the relator is now, and for many years last past has been, a resident citizen and taxpayer of the State of Indiana, and that he is now, and for several years last past has been, the duly appointed and acting guardian of the person and estate of Thomas P. Hawley, who is of the age of nineteen years, a native of the State of Indiana, and has always resided, and still resides, in said State; that, pursuant to the laws of the State of Indiana, Purdue University has been located and organized near the city of Lafayette, in said State, and that said university is now, and for several years last past has been, engaged in the education of a portion of the young men and young women, and of the children of this State; that said university is fully equipped with the necessary buildings and apparatus for the business in which it is engaged, and has a full corps of teachers; that the defendants to this proceeding are such teachers, and have assumed to be, have been heretofore acting as, and now are, the faculty of said university, with the said Emerson E. White as the president thereof; that said university is the agricultural college of the State of Indiana, and was endowed under and by virtue of an act of the Congress of the United States, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July 2d, 1862, and the acts of Congress supplementary thereto, and is maintained by the income of such endowment, and by appropriations made by the Gen-

The State, *ex rel.* Stallard, v. White *et al.*

eral Assembly of the State of Indiana; that said Thomas P. Hawley is a taxpayer of said State, was at the time hereinafter mentioned, and is now free from any disease or mental or physical defects and was then and still is, in all respects, qualified and fitted for admission, and had the right to be admitted, as a student in said university; that the defendants, so constituting and acting as the faculty of said university prior to the time hereinafter mentioned, and amongst others, made and prescribed the following regulation, known as regulation No. 3, for the government of said university:

"No student is permitted to join or be connected as a member or otherwise with any so-called Greek or other college secret society; and as a condition of admission to the university, or promotion therein, each student is required to give a written pledge that he or she will observe this regulation. A violation of this regulation and pledge forfeits the right of any student to class promotion at the end of the year, and to an honorable dismissal."

The complaint further averred that on the 8th day of September, 1881, the defendants, as teachers in and so constituting the faculty of said university, opened such university for the reception and instruction of students therein, that being the time appointed for the beginning of a school term in the university; that on said 8th day of September, 1881, the defendants, as such faculty, had the power and authority, and it was their duty to admit properly qualified persons as students in said university; that on that day the said Thomas P. Hawley, being then and there qualified for admission in said university as hereinbefore stated, and being desirous of pursuing a course of study, which had theretofore been agreed upon between him and the defendant White, as the president of the faculty, and which course of study was within the regular course prescribed by the faculty for the university, presented himself to the defendants, as such teachers and faculty, and asked to be admitted as a student to receive instruction in the university, and then and there tendered all the re-

The State, ex rel. Stallard, v. White et al.

quired fees for admission as a student therein; that at that time the university was not full, but there was ample room for said Hawley as a student therein; that the said Hawley was then ready and willing, has ever since been and still is ready and willing, to conform to all rightful and proper rules and regulations prescribed for the government of the university; that at the time the said Hawley so presented himself for admission in said university, the defendant White, as the president of the faculty, tendered to him a written pledge, which he, the said White, required him, the said Hawley, to sign, which pledge was substantially as follows:

"I do hereby state upon my honor that in the month of April last, when I applied for and received an honorable dismission from Purdue University, I was not a member of any so-called Greek fraternity, or other college secret society, and at the time I connected myself with a chapter of the Sigma Chi fraternity I did not intend returning to Purdue University. I do solemnly promise that I will disconnect myself as an active member of the Sigma Chi fraternity during my connection with Purdue University."

That said Hawley refused to sign said pledge, but then and there expressed himself as ready and willing to obey and conform to any and every existing rule and regulation of said university, and any and every rightful and lawful rule and regulation which might thereafter be prescribed by the proper authorities acting for the university, saving and excepting any rule or regulation which might forbid his connection with said Sigma Chi fraternity, or other societies connected with colleges, and commonly known as "Greek Fraternities."

The complaint then proceeded as follows: "And said relator avers that said Sigma Chi fraternity is one of a class of secret societies, which are and for many years have been established, permitted and encouraged in very many of the oldest and best colleges of the United States; that such societies are commonly known as 'Greek Fraternities,' from the fact that they are usually named from letters of the Greek alpha-

The State, ex rel. Stallard, v. White et al.

bet ; that such societies embrace among their members presidents and professors in colleges, senators and representatives in Congress, judges, lawyers, physicians, ministers of the gospel and very many persons of almost every calling, distinguished for their intellectual and moral worth ; that the object and aim of such societies is to elevate the standard of education, and to secure among their members advanced culture in the classics and in the liberal arts and sciences ; that the basis of such societies is morality ; that there is nothing in the constitution, aims or objects of such societies which is inimical to the constitution and laws of the United States, or to the constitution and laws of the State of Indiana, and that the tendency of such societies is to promote the moral and educational interests of their members, the true interests of learning, and the highest and best interests in every department of the institutions with which they are connected."

The complaint still further averred, that, upon the refusal of the said Hawley to sign the pledge tendered to him by the defendant White, as above set forth, the defendants, so constituting the faculty of said Purdue University, refused, and have ever since continued to refuse, to admit him, said Hawley, as a student in said university, assigning as their only reason for not admitting him as a student therein, his refusal to sign the pledge so tendered him by the defendant White. Wherefore the relator prayed that a writ of mandate might issue directed to the defendants commanding them to admit the said Hawley as a student in the university.

An alternative writ of mandate was issued to the defendants, who thereupon appeared to the action and demurred to the complaint, for want of sufficient facts to entitle the relator to the relief demanded ; but, before final action was taken upon their demurrer, they moved to strike out, as irrelevant and immaterial, all that part of the complaint having reference to the character, objects and aims of the Sigma Chi fraternity, and of the class of college societies to which it belongs, and

The State, *ex rel.* Stallard, *v.* White *et al.*

which is included within quotation marks, and their motion was sustained.

The court then, upon further consideration, sustained the demurrer to the complaint, and, the relator declining to plead further, final judgment was rendered in favor of the defendants.

Error is assigned upon the striking out of a part of the complaint as above stated, and upon the decision of the court sustaining the demurrer to the complaint.

Purdue University constitutes no part of our system of common schools, and has no direct connection with that system; but it is an institution of learning primarily endowed by Congress, and continued in existence very largely by appropriations made by the General Assembly of this State. It is, therefore, an educational institution sustaining relations to the people at large analogous to those occupied by other public schools and colleges of the State, maintained at public expense, and one in which all the inhabitants of the State have a common interest. The general principles underlying the educational system of the State are, consequently, applicable to the government and control of Purdue University, and, in the absence of express legislative provisions, must be invoked in determining the powers which that institution may exercise.

The fourth section of the act of the General Assembly of this State, accepting the donation made by Congress for the support of agricultural colleges, and providing for the location and organization of Purdue University, approved May 6th, 1869, reads as follows:

“From and after the date of the location made as aforesaid, the corporate name of the Trustees of the Indiana Agricultural College shall be ‘The Trustees of Purdue University,’ and they shall take in charge, have, hold, possess and manage all and singular the property and moneys comprehended in said donations, as also the fund derived from the sale of the land scrip donated under said ‘act of Congress,’ and the increase thereof, and all moneys or other property which may hereafter at any time be donated to and for the use of said institution. They

The State, ex rel. Stallard, v. White et al.

shall also have power to organize said university in conformity with the purposes set forth in said act of Congress, holding their meetings at such times and places as they may agree on, and a majority of their number constituting a quorum. They shall provide a seal; have power to elect all professors and teachers, removable at their pleasure; fix and regulate compensations; do all acts necessary and expedient to put and keep said university in operation, and make all by-laws, rules and regulations required or proper to conduct and manage the same."

This section confers no greater power on the trustees of Purdue University, as regards making rules and regulations for its conduct and management, than is usually conferred upon like officers of similar institutions, and leaves the question as to who are entitled to admission as students in that university to be determined by the principles underlying our general system of education to which reference has already been made.

The admission of students in a public educational institution is one thing, and the government and control of students after they are admitted, and have become subject to the jurisdiction of the institution, is quite another thing.

The first rests upon well established rules, either prescribed by law or sanctioned by usage, from which the right to admission is to be determined. The latter rests largely in the discretion of the officers in charge, the regulations prescribed for that purpose being subject to modification or change from time to time as supposed emergencies may arise.

Having in view the various statutes in force in this State touching educational affairs, and the decisions of this court, as well as of other courts, bearing on the general subject, we think it may be safely said that every inhabitant of this State, of suitable age, and of reasonably good moral character, not afflicted with any contagious or loathsome disease, and not incapacitated by some mental or physical infirmity, is entitled to admission as a student in the Purdue University.

The State, *ex rel.* Stallard, *v.* White *et al.*

This right of admission may not be enforced when there is not sufficient room in the university, and may be postponed until the applicant has made some proficiency in merely preliminary studies; but it is a right which the trustees are not authorized to materially abridge, and which they can not, as an abstract proposition, rightfully deny. *Cory v. Carter*, 48 Ind. 327 (17 Am. R. 738); *State v. Duffy*, 7 Nev. 342 (8 Am. R. 713); *Chase v. Stephenson*, 71 Ill. 383; *Trustees, etc., v. People*, 87 Ill. 303 (29 Am. R. 55); *Rulison v. Post*, 79 Ill. 567; *People v. Board, etc.*, 18 Mich. 400; *Foltz v. Hoge*, 54 Cal. 28; *Ward v. Flood*, 48 Cal. 36.

The greater number of authorities cited by counsel have reference to the government and control of persons after they have been admitted as students in some scholastic institution, and hence, as we conceive, have no direct application to the real questions involved in this case.

The case of *People, ex rel. Pratt, v. Wheaton College*, 40 Ill. 186, much relied on in the argument, is a case of that class; besides, Wheaton College was an institution resting on private endowment, and deriving no aid whatever from taxation, or any other public source.

It is clearly within the power of the trustees, and of the faculty when acting presumably, or otherwise, in their behalf, to absolutely prohibit any connection between the Greek fraternities and the university.

The trustees have also the undoubted authority to prohibit the attendance of students upon the meetings of such Greek fraternities, or from having any other active connection with such organizations, so long as such students remain under the control of the university, whenever such attendance upon the meetings of, or other active connection with, such fraternities tends in any material degree to interfere with the proper relations of students to the university.

As to the propriety of such and similar inhibitions and restrictions, the trustees, aided by the experience of the faculty, ought and are presumed to be, the better judges, and,

The State, *ex rel.* Stallard, v. White *et al.*

as to all such matters, within reasonable limits, the power of the trustees is plenary and complete. *Roberts v. City of Boston*, 5 Cush. 198; *Spiller v. Inhabitants, etc.*, 12 Allen, 127; *Hodgkins v. Inhabitants, etc.*, 105 Mass. 475; *Ferriter v. Tyler*, 48 Vermont, 444 (21 Am. R. 133); *State v. Burton*, 45 Wis. 150 (30 Am. R. 706); *Spear v. Cummings*, 23 Pick. 224; *Donahoe v. Richards*, 38 Maine, 379; *Dallas v. Fosdick*, 40 How. Pr. 249; *Dritt v. Snodgrass*, 66 Mo. 286 (27 Am. R. 343).

But the possession of this great power over a student after he has entered the university does not justify the imposition of either degrading or extraordinary terms as a condition of admission into it. Nor does it justify anything which may be construed as an invidious discrimination against an applicant on account of his previous membership in any one of the Greek fraternities, conceding their character, object and aims to be what they were averred to be in the complaint.

Every student, upon his admission into an institution of learning, impliedly promises to submit to, and to be governed by, all the necessary and proper rules and regulations which have been, or may thereafter be, adopted for the government of the institution, and the exaction of any pledge or condition which requires him to promise more than that operates as a practical abridgment of his right of admission, and involves the exercise of a power greater than has been conferred upon either trustees or the faculty of Purdue University.

Regulations adopted by persons in charge of a school are analogous to by-laws enacted by municipal and other corporations, and both will be annulled by the courts when found to be unauthorized, against common right or palpably unreasonable. *Angell and Ames Corporations*, section 357; *Dillon Mun. Corp.*, 3d ed., section 369; *People v. Medical Society, etc.*, 24 Barb. 570; *People v. Medical Society, etc.*, 32 N. Y. 187; *People v. Mechanics' Aid Society*, 22 Mich. 86; *Fuller v. Plainfield, etc., School*, 6 Conn. 532.

In the first place, the pledge tendered by President White to Hawley was not shown to have been authorized by any

The State, ex rel. Stallard, v. White et al.

previous general regulation adopted for the government of the university. As applicable to Hawley it was, therefore, special, exceptional and apparently not demanded by any competent authority.

In the next place, it carried with it the implication that membership in the Sigma Chi fraternity might properly be treated as a disqualification for admission as a student in the university, a doctrine wholly inadmissible in its application to Purdue University, or to any of the other public schools or colleges of the State.

If mere membership in any of the so-called Greek fraternities may be treated as a disqualification for admission as a student in a public school, then membership in any other secret or similar society may be converted into a like disqualification, and in this way discriminations might be made against large classes of the inhabitants of the State, in utter disregard of the fundamental ideas upon which our entire educational system is based.

Membership in an inherently immoral society or fraternity might perhaps be urged against the admissibility of a student, upon the ground that such relation to such a society or fraternity tended to establish a want of moral character or moral fitness in the applicant, and in that view the allegations of the complaint as to the character, objects and aims of the Sigma Chi society, and other kindred Greek fraternities, became material and ought not to have been struck out.

Although some of those allegations may have been somewhat argumentative in form, they, as a whole, tended to show that, abstractly considered, there was no impropriety in either becoming a member of, or otherwise connected with, the Sigma Chi fraternity, and that the objections seemingly entertained by the faculty against that and other fraternities of the same class, were not, in some respects at least, well founded.

Our conclusion is that so much of regulation No. 3, adopted by the faculty, as may be construed to impose disabilities on persons already members of the Greek fraternities, and as

The State, *ex rel.* Stallard, v. White *et al.*

requires a written pledge as a condition of admission, is both *ultra vires* and palpably unreasonable, and hence inoperative and void, and that the pledge tendered to Hawley was one which the faculty had no legal right to demand as a condition of his admission.

It follows that the court erred, both in striking out a part of the complaint as irrelevant and immaterial, and in sustaining the demurrer to the complaint.

At the request of the parties, we have considered this case upon the theory that regulation No. 3, *supra*, was adopted by the express authority of the trustees, and hence have made no inquiry as to the authority of the faculty in making regulations for the government of the university, when acting independently of the trustees.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

DISSENTING OPINION.

WOODS, J.—While agreeing with the principal opinion in respect to the power of the trustees and faculty to exclude from the university the Greek letter fraternities, and to prescribe, in their discretion, reasonable rules for the control of the students of the institution, while in attendance and amenable to its regulations, there are propositions in the opinion, besides the conclusion reached, to which I do not assent.

The proposition is put forward, seemingly as pivotal, that the admission of students is one thing, and the government of them after admission is quite another thing, and on the strength of this it is said that the authorities in relation to the government and control of persons after they have been admitted have no direct application to the question involved in the case.

As applicable to the case in the record, the distinction seems to me to be unsubstantial and immaterial.

If the moment a student has passed the portal of the institution he is bound to obey a prescribed rule of the college, he

The State, *ex rel.* Stallard, v. White *et al.*

may, in all reason, be required, before he is permitted to enter, to promise obedience. The final remedy for disobedience is expulsion, and, if there may be expulsion for disobeying, there may be exclusion for refusing to promise compliance with a proper regulation. See *Spear v. Cummings*, 23 Pick. 224; *Sherman v. Inhabitants, etc.*, 8 Cush. 160; *King v. Jefferson City School Board*, 71 Mo. 628; S. C., 36 Am. R. 499. To require such promise can not, in my judgment, be regarded as an "imposition of either degrading or extraordinary terms as a condition of admission." If it may be called a condition of admission, it is not an improper or unwarranted one. It is not every student, nor perhaps the majority of those who are likely to seek admission to such an institution, who has attained the high standard of culture and manhood which will enable him to appreciate, and will insure his respect for that implied obligation which arises from the mere fact of admission to the college; and if the faculty, in their wisdom or as a result of their experience, have determined that an express promise, exacted of all alike, is a more efficient means of securing good order and good behavior, the courts can not safely, or with propriety, undertake to review their decision. Neither is there, in my opinion, anything degrading in the requirement or in the acceptance of such pledge. If there were no express declaration required by law, there would be an implied promise on the part of every foreigner who seeks citizenship in the nation, that he renounce his former allegiance, and be a true and faithful citizen of the Republic. The law, however, is not content with this implied, nor, indeed, with an express promise, but requires besides the sanction of an oath. Yet, so far as I know, it has never been suggested that these oaths of allegiance and of renunciation were degrading to the applicant for citizenship, and much less, in my judgment, can it be deemed derogatory to the character and just pride of the youth of the State, when they seek the benefits of such an institution, that they be required, for the general

The State, *ex rel.* Stallard, v. White *et al.*

good, to give an express promise to abide by those reasonable regulations, which, once they have been admitted, it is conceded they must observe.

There is, perhaps, not one of all the fraternal and secret societies to which reference has been made in the discussion, that does not impose upon its initiate more exacting pledges, or a portentous oath instead. Every one inducted into an office must take the oath faithfully, to perform his duties, and even the churches generally require some declaration of faith or other form of public promise. These are a part of the laws and customs of our social organization; they are certainly not generally deemed to be dishonoring, and are quite too common to be called extraordinary; or, if so, the fact is, to say the least, not so well known and generally accepted as to be the subject of judicial cognizance.

I agree that the special pledge submitted to Hawley was not a proper one, because it did not stop at requiring obedience to existing rules. This fact, however, as I conceive, cuts no figure in the legal aspect of the case. In order to obtain a mandate for his admission to the college, it was not enough for him to show that an improper obstacle had been opposed to him; he was bound to show affirmatively that he was on all grounds entitled to admission, as well as that he had been excluded for a particular improper cause. Unless willing to abide by all proper rules of the institution, he was not entitled to enter at all; and, instead of showing that willingness, the complaint shows expressly that one rule of the college he would not promise to obey, not because he considered it derogatory to his honor to make any promise at all (his readiness to promise obedience to the rules on other subjects is declared), but because he disputed the rightful authority of the faculty or trustees to impose *that* regulation upon him.

The real question therefore is whether rule number three is a rule which the courts ought to declare invalid. Properly interpreted, I think it one which the faculty, under the

sanction of the trustees, had a right to enforce. Taken literally, the rule might be deemed to be an unwarranted effort to interfere with the freedom of those who became students to have any connection whatever with the Greek fraternities, from the time of admission until their final departure, though they formed such connections elsewhere, and in such a way as in no degree to affect their conduct as students; but, properly construed, the rule, in my opinion, has reference to the conduct of the student as such while in attendance, and not when in vacation or at other times he might be absent from the college, beyond the limits of supervision by the faculty and under the authority and admonition of his parents or guardian.

The right of the faculty to exclude these fraternities from the college, and to forbid the student having an active connection with them either in or outside of the college walls, while in attendance as a student, the principal opinion, as I understand it, concedes; and, as I read it, the rule means no more. That the faculty so understood it, is shown by the pledge tendered to Hawley, whereby he was required, not to sever his connection, but only to cease active membership in the society which he had joined. This is a possible and not unreasonable construction of the rule, and should be adopted, so long as there is no averment that a different construction was placed upon it by the college authorities.

In my judgment, the court committed no error in striking out parts of the complaint. The ground on which the learned counsel for the appellant based their objection to the ruling was, that the excised averments showed that the Greek fraternities were entitled to admission into the university, and that the rule, or any rule for their exclusion, was beyond the power of the board of trustees or faculty to adopt. The principal opinion, impliedly at least, overrules this position, and, in this respect, is clearly right. Conceding all the excellencies attributed to these fraternities as educational aids, it is still true, so long as a college can not appropriate to itself all such efficient helps, and a selection of the fittest must be made,

The State, *ex rel.* Stallard, *v.* White *et al.*

that the faculty and board of trustees, rather than the students put under their authority, must dictate the choice. This being so, it seems to me, there is no tenable ground for saying that the allegations in question were at all relevant. They are not relevant to the moral character of the applicant, any more than if he had been a Mason, Odd Fellow, Presbyterian or Methodist, it would have been pertinent to allege the character and aims of those organizations, and to catalogue the distinguished officials and characters which had belonged to them, or to state the conduct of other colleges in reference to them.

I think the judgment ought to be affirmed.

ON PETITION FOR A REHEARING.

NIBLACK, J.—Accompanying a petition for a rehearing, the appellees have submitted an exhaustive argument, controverting all the material conclusions announced in the opinion in this case, and asking for a reconsideration of the whole case, and, if that can not be granted, then for important modifications and explanations of some portions of the opinion in the form in which it has been promulgated. The Attorney General has also filed a brief on behalf of the trustees of Purdue University, concurring in the request of the appellees.

We have given the cause such further consideration as its importance has demanded, and have made some merely verbal changes in our opinion as originally filed, so as to better express, in some instances, our real meaning. With these changes we are content that the opinion shall stand as the judgment of this court upon the facts as presented by the record.

In legal effect we have only decided that regulation No. 3, adopted by the faculty, and the special pledge tendered to Hawley, fairly implied a discrimination against a class of the inhabitants of this State, as much entitled to admission in the university as any other class, and that to that extent that regulation and that special pledge were both unlawful and unreasonable. All else embraced in the opinion was merely by way of argument and illustration, and as collateral to the

The State, *ex rel.* Stallard, v. White *et al.*

real questions before us, intended to impress upon those most interested the difference between abridging the right of admission into a public school, and the authority to govern and control students after they have been admitted. That difference impressed us then, and still impresses us, as being important in the consideration of this case.

Where all the conditions attaching to an inhabitant of the State are such as to entitle him to admission into a public school, he can not be deprived of that right by the requirement of unusual and exceptional preliminary pledges, directed only against a portion or a class of the people of the State.

Such unusual and exceptional pledges are not only unlawful in their spirit and application, but are unreasonable as productive of irritation, litigation, and generally of injurious consequences to the institution attempting to enforce them. Whether any express pledge, applicable in its operation alike to all, and as preliminary to admission, may, in any case, be required, is a question we have not fully considered, and concerning which nothing has been or is now decided. Nor is it practicable for us to enter into a further discussion of the authority of the trustees or a faculty over students after they have been admitted as such into a public school. It is impossible to foresee, or even to conjecture, every contingency that may arise involving judicial interpretation in that respect. What we have already said on that subject is quite sufficient for our present purpose, and was more than was absolutely necessary to a decision of this cause. Where an inhabitant of the State has acquired the right of admission into a public school, and that right has been unjustly denied, he is as much injured as if some important property right had been invaded, and is as much entitled to appeal to the courts for relief. This has been settled by innumerable precedents and decided cases, and is no longer an open question. It is equally the duty of the courts to grant relief against the enforcement of unjust and unreasonable regulations for the government of public schools, after all ques-

 Boyd v. Olvey.

tions of admission have been disposed of. There is nothing in the legislation of this State which deprives our courts of jurisdiction in respect to such controversies, and we know of no reason, originating in public policy, which would deny such jurisdiction to the courts without first providing suitable means for redress before some other competent tribunal.

Courts are reluctant to interpose their authority against the action of school trustees and school boards, and others similarly charged with special and peculiar duties, and ordinarily will not do so, except in cases in which manifest injustice has been done, or some serious mistake has been made, but when a proper case is presented for judicial interference, a plain duty is imposed, which the courts can not and ought not to evade.

The petition for a rehearing is overruled.

WOODS, J., dissents.

82	294
133	674
82	294
146	364
82	294
158	290
82	294
159	71
82	294
162	331
82	294
169	576

 No. 9031.

BOYD v. OLVEY.

PLEADING.—Action to Quiet Title.—Averments as to Claim of Defendant.—It is not necessary that the complaint, in an action to quiet title, should show with particularity the nature of the defendant's claim; and where the complaint, in such an action by the owner of real estate sold on execution, avers that the defendant refused to recognize the redemption of the land by the plaintiff, made prior to the expiration of the year allowed for redemption, but thereafter demanded and received a deed from the sheriff, such averments sufficiently show a claim by the defendant under color of title, adverse to the plaintiff, from which the owner is entitled to have the property freed.

SAME.—Practice.—Demurrer.—A pleading which shows that the party is entitled to some relief, though not to all the relief prayed, is sufficient on demurrer.

SAME.—Inferences from Facts.—Conclusions.—Where facts are properly pleaded, courts will draw the proper inferences; but the statement of the pleader's conclusions neither adds to nor detracts from the facts pleaded.

Boyd v. Olvey.

SAME.—Exhibits.—It is only where a pleading is founded upon a written instrument that it is necessary to set out the instrument.

REDEMPTION.—Payment to Clerk of Bank Notes.—Complaint.—The holder of a sheriff's certificate of purchase of real estate sold on execution can not defeat a redemption in a case where the clerk receives in good faith the amount necessary to redeem in bank notes, deposits them in bank and has continuously, from the time of the receipt, lawful money ready for the holder of the certificate, which he is willing to deliver, and does tender to him, and where such facts appear in the complaint, in an action to set aside the sheriff's deed executed after such redemption, and to quiet title to the land, the complaint is sufficient on demurrer.

MONEY.—Legal Tender.—In legal acceptance, money means gold or silver coinage or notes made a legal tender by a valid statutory enactment. National bank notes are, therefore, not money. A creditor may receive bank notes as money, but he can not be compelled to do so.

SAME.—County Clerk may require Legal Tender Money in Payment of Redemption of Land Sold on Execution.—Waiver.—A county clerk may require gold or silver coin or notes made by law a legal tender, in payment of the amount necessary to redeem land sold on execution, but he may receive payment in its equivalent, and, where he does so, and holds himself in readiness to pay in legal tender, the holder of the sheriff's certificate can not, for his failure to require payment in legal tender, defeat the redemption.

BANKRUPTCY.—Bankrupt's Property.—Title Revests on Discharge Without Proof of Claims.—Judgment of Discharge can not be Collaterally Attacked.—Where a person has been adjudged a bankrupt and his property conveyed to an assignee, and no claims are proved against the bankrupt, and both bankrupt and the assignee are legally discharged, the property in the hands of the assignee revests in the bankrupt without any formal conveyance. Such judgment of discharge can not be collaterally impeached, even as to the fact that the bankrupt was not entitled to a discharge.

From the Hancock Circuit Court.

T. S. Rollins and M. Marsh, for appellant.

J. A. New and J. W. Jones, for appellee.

ELLIOTT, C. J.—The material facts stated in the first paragraph of the appellee's complaint, may be thus summarized: On the 28th day of August, 1876, appellee executed a mortgage to Joseph Deitch, which was foreclosed at the suit of the mortgagee on the 27th day of October, 1877, sale was made on the decree, and the mortgaged real estate bought in by the mortgagee on the 19th day of November. Deitch re-

Boyd v. Olvey.

ceived a certificate from the sheriff, and afterwards assigned it to the appellant. Prior to the expiration of the year allowed for redemption, the appellee deposited with the clerk for the use of Boyd, and in redemption of the land, the principal, interest and costs of the judgment and sale. The money deposited was, to quote from the complaint, "lawful money of the United States." After the payment to the clerk the appellant demanded and received a deed from the sheriff. The prayer is that the deed of the sheriff to appellant be set aside and appellee's title quieted.

We think the complaint very clearly shows that the appellant's act is such as entitles the appellee to his action. The fact that he refused to recognize the redemption of the appellee as a valid one, and demanded and received a deed, shows the assertion of a claim against appellee's property. It is not necessary that the complaint should show with any great particularity the nature of the claim of the defendant; for, as that is a matter peculiarly within the knowledge of the latter, the plaintiff is not required to state it specifically.

The deed executed to the appellant clouds appellee's title. It is a settled rule that clouds upon titles will be removed at the suit of the owner of the land. The complaint shows a claim under color of title, for it shows the demand and receipt of a deed, and from all such claims the true owner is entitled to have his property freed.

Where a complaint entitles the complainant to some relief, although not to all the relief prayed, it will repel an attack by demurrer. *Bayless v. Glenn*, 72 Ind. 5; *Teal v. Spangler*, 72 Ind. 381. The paragraph of the complaint under immediate mention does entitle the appellee to have the cloud cast by the delivery of the sheriff's deed to the appellant removed from his title. It entitles him to have his redemption declared sufficient.

Where facts are properly pleaded, courts will draw the proper inferences. The inference from the refusal of the appellant to recognize the redemption of appellee, and his de-

Boyd v. Olvey.

mand and receipt of a deed, over the objection of his adversary, is easily drawn. There can be no difficulty in concluding as a matter of law, that the appellant asserted a claim of title adverse to the appellee. The statement of the pleader's conclusion would not have strengthened the complaint. Where facts are stated which supply adequate grounds for a conclusion of law, the statement of a conclusion by the pleader adds no strength, and where they are not sufficient the statement of the conclusion does no good.

It is only where the pleading is founded upon a written instrument that it is necessary to set out the instrument. The complaint is not founded on the sheriff's deed, and it was therefore not necessary to make it an exhibit.

The third paragraph of the complaint differs from the first in one important particular. Instead of alleging, as the first does, that the redemption was made in lawful money, it is alleged that, "before the defendant was entitled to a deed for the property, to wit, on the 18th day of November, 1878, the plaintiff deposited in the office of the clerk of the Hancock Circuit Court, for the use and benefit of said Boyd, and in full redemption of said real estate, and in full of Deitch's bid and ten per centum per annum interest thereon from the date thereof to the date of payment into the hands of the clerk, the sum of \$865.55, and he avers that the sum so paid into the hands of the clerk was in legal tender money of the United States and national bank notes, which was received by the clerk in full redemption of the real estate, and which sum was received by the clerk, and deposited by him in his own name in the Greenfield Banking Company's Bank, and the clerk at the time of payment entered full satisfaction of said judgment and said sale, and entered of record full redemption of said sale; and plaintiff avers that the clerk ever since the said payment has been ready and willing, and now is ready and willing, and now brings into court the said sum of \$865.55 in legal tender money of the United States for said Boyd."

A just construction of this pleading refers the readiness of

Boyd v. Olvey.

the clerk to pay the appellee in lawful money, the deposit of the bank notes received from appellee, and all other acts connected with the redemption to the 18th day of November. No other time is referred to, either directly or indirectly. The use of the word "said," as indeed does the entire context, shows that the time when lawful money was ready for the appellant was the 18th day of November, and this time is by a direct averment shown to have been within the year allowed for redemption. The effect of the allegation that the money was paid before the defendant was entitled to a deed, coupled as it is with specific allegations, is to identify and fix the time as to all the acts done in connection with the receipt and disposition of the bank and legal tender notes received by the clerk.

The precise question which we have for decision is this: Can the holder of a sheriff's certificate defeat a redemption in a case where the clerk receives in good faith bank notes, deposits them in bank, and has continuously, from the time of the receipt, lawful money ready for the holder of the certificate, which he is willing to deliver to him, and which he does tender him?

It was said in *Hamilton v. State*, 60 Ind. 193 (28 Am. R. 653), that the notes of the national banks are in no sense money of the United States, and this is unquestionably a correct statement of the law. In commercial affairs bank notes are money, but in a legal sense they are not. *Morris v. Edwards*, 1 Ohio, 189; *Paul v. Ball*, 31 Tex. 10; *Kennedy v. Briere*, 45 Tex. 305; *Morrill v. Brown*, 15 Pick. 173. Money, in legal acceptance, means gold and silver, or notes made a legal tender by a valid statutory enactment. National bank notes are not money, for they are not a legal tender. *Anderson v. Ewing*, 3 Litt. 245; *Corbit v. Bank of Smyrna*, 2 Har. Del. 235 (30 Am. Dec. 635); *Lange v. Kohne*, 1 McCord, 115; *Waterman v. Waterman*, 34 Mich. 490.

The act authorizing the redemption of land sold upon judgments requires that the holder of the sheriff's certificate shall receive lawful money; he can not be compelled to ac-

Boyd v. Olvey.

cept bank notes. A creditor may, if he elects, receive bank notes as money, but he can not be compelled to do so.

The clerk is not bound to receive in redemption anything but money. He is under no legal obligation to accept bank notes, or other circulating medium, treated by the business world as money, but may require gold or silver coin or notes made by law a legal tender.

The clerk in the present case did, however, receive bank notes as money, did treat them as such, did allow them to perform the functions of money, and does make them money to the holder of the sheriff's certificate. The appellant has suffered and can suffer no injury by the clerk's act in treating the notes as money, for they are made money to him by the clerk, and money they have been to him from the time the clerk received them in redemption. Now, as no possible injury can arise to the appellant, ought the substantial rights of the debtor to be sacrificed because he paid bank notes as money, to an officer expressly authorized and directed by law to receive money paid in redemption of property sold upon execution?

The case at bar is distinguishable from that of *Armsworth v. Scotten*, 29 Ind. 495, in at least two material respects. In that case the real question was whether the payment to the clerk of the amount of a judgment in bank notes operated as an extinguishment of the judgment, and it was held that the payment was not a discharge. Here we are not enquiring whether such a payment will extinguish a judgment, but whether an officer, having full authority to receive the money paid in redemption of lands sold on execution, may take upon himself the responsibility of receiving bank notes as the equivalent of money, and whether, when so received and made money to the execution creditor, the redemption shall be defeated. Nor was there in the case cited any pretence that the officer had treated the bank notes as money, or that he had offered to make them money to the person entitled to demand money. What we have said of *Armsworth v. Scotten*, applies

Boyd v. Olvey.

to *Prather v. State Bank*, 3 Ind. 356. Both of these cases are founded upon *Griffin v. Thompson*, 2 How. 244, where the sole question was whether an execution debtor could compel the creditor to accept bank notes instead of money. That case arose upon the motion of the debtor to compel the creditor to enter satisfaction of his judgment, and in support of this motion it was shown that bank notes had been paid to the officer. The question presented for decision was whether the creditor could be compelled to accept the bank notes. We quote from the opinion: "With his claim thus solemnly ascertained of record, we are aware of no authority, from any source, which can compel him to commute it, or to receive in satisfaction thereof any other thing which he shall not voluntarily elect. * * * * To permit either the debtor or the officer to impose upon the creditor the receipt of depreciated paper in payment, would be to permit not merely a repeal of the judgment, but a violation, a virtual abrogation indeed, of the contract on which it was founded." The wide difference between the cases cited and the one before us is, that in the former there was an attempt to make the creditor receive bank notes as money, whereas in the latter he is tendered money.

It has been often held that where bank notes are received as money, and accomplish the same purpose, they will be regarded as money in the strictest sense of the term. The greatest commercial lawyer of England long since pointed out the difference between bank notes circulating as money, and private drafts or promissory notes. In *Miller v. Race*, 1 Burr. 452, this great judge observed that they are not like bills of exchange, considered as mere securities or documents for debts. Judge STORY, speaking for the court, in *United States Bank v. Bank of Georgia*, 10 Wheat. 333, said: "Bank notes constitute a part of the common currency of the country, and, ordinarily, pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to." In the quaintly reported case of *Austen v. Dodwell*, Equity Abridg. 318, this

Boyd v. Olvey.

distinction is recognized, and the reporter says: "And it was held by my lord chancellor, that this tender in a bank note was not, strictly speaking, a legal tender; but since it was proved the plaintiff offered to turn it into money, that made it a good tender." We do not cite these cases for the purpose of approving or disapproving the statement that a tender in bank notes is valid if not objected to, for that is foreign to our present enquiry; but for the purpose of showing the distinction between bank notes and drafts, or like instruments. We do rely upon them as showing that bank notes are often deemed money. Parsons says—and the cases cited fully sustain the statement: "It seems to be settled that a payment in good bank bills, not objected to at the time, is a good payment; and so is a tender of such bills; but the creditor may object and demand specie." 2 Parsons Cont. 621, 645. We are now prepared to understand the reason for the holding in *Corbit v. Bank of Smyrna*, 2 Har. 235, where it was held of bank bills: "If they have worked payment or satisfaction, actual or legal, they are in such case considered as money, and equivalent to so much coin." This result has been effected by the bank bills deposited with the clerk by the appellee. They have brought money to the appellant. They are and have been money to him since they went into the clerk's hands. Having accomplished this result, it seems to us that bare justice requires that the appellee should not lose his property because the officer designated by law received bank notes as money, without objection, and especially where, as here, money still they are, so far as concerns the creditor.

"A check is substantially the same as an inland bill of exchange," although there are some points of difference. 2 Daniel Neg. Inst. 528. Ordinarily, checks do not extinguish debts; if paid they have this effect, otherwise not. 2 Daniel Neg. Inst. 577; 2 Parsons Con. 622. We have already seen that bank notes accepted without objection constitute full payment, and we find it equally well settled that a check does not. If it can be justly held that a payment by check

Boyd v. Olvey.

to the clerk can be sustained, it surely must be held that payment in bank notes should be sustained; but payment by check has been upheld, and, therefore, it must be held that payment in bank notes should be enforced. It was held in *Jessup v. Carey*, 61 Ind. 584, that a redemption was valid in a case where the clerk had accepted the check of the redemptioner. Said the court, in the case cited: "If the appellant Walton had the money to his credit in bank, subject to his check, and the clerk of the court was willing to, and did, receive his check as so much money, the transaction was fully sanctioned by the ordinary usages of business, and was certainly not an illegal payment, if it culminated in the actual payment of the amount of the check, upon presentation thereof." It was also said: "It affirmatively appeared on the face of said complaint, that, within the time limited by law for the redemption of said real estate, the money called for by said check was placed to the credit of the clerk of the Hamilton Circuit Court, in the Citizens' Bank of Noblesville, the county seat of said Hamilton county." In the case in hand the bank notes "culminated in money;" at the outset they were infinitely more like money than a check. So, too, the bank notes went to the credit of the clerk in a bank of the county seat. The points of resemblance are close, but the present case is much the plainer one, for the reason that the clerk took what, the commercial world over, is regarded as money; while in the one cited the officer took what is not looked upon as money anywhere.

There are many cases carrying the doctrine of payment in bank notes far beyond what we are required to do to sustain this judgment. *Ex parte Board*, 4 Cowen, 420; *Hall v. Fisher*, 9 Barb. 17; *Ex parte Becker*, 4 Hill, 613; *Scott v. Commonwealth*, 5 J. J. Marshall, 643; *Governor v. Carter*, 3 Hawks, 328 (14 Am. Dec. 588). There are strong cases sustaining the doctrine that payment by check is a valid redemption. In *Webb v. Watson*, 18 Iowa, 537, it was said: "To a certain extent the clerk must be recognized as the agent of the purchaser. His

Boyd v. Olvey.

powers are by no means so unlimited as to authorize him to receive anything else than money or its equivalent for the redemption. But when, without fraud on the part of the debtor, he receives such equivalent, and the debtor in good faith takes his acquittance, whatever may be his ultimate liability to the clerk, the creditor or purchaser cannot be heard to repudiate the act of the officer to the extent of defeating the redemption." The cases of *People v. Mayhew*, 26 Cal. 655, of *Nopson v. Horton*, 20 Minn. 268, and of *Carter v. Lewis*, 27 Mich. 241, declare and enforce a principle substantially the same as that decided in the case from which we have quoted.

The demurrers to the first and third paragraphs of the complaint were correctly overruled.

The second paragraph of the appellant's answer alleges that the appellee was adjudged a bankrupt; that an assignee was appointed and the property transferred to him; that since such adjudication and transfer appellee has never acquired any title to the real estate in controversy. The reply of the appellee admits the adjudication and the transfer to the assignee in bankruptcy, and alleges that such proceedings were had in the matter that no claims were proved against him; that prior to the expiration of the year for redemption the assignee filed his final report; that the assignee had not disposed of the mortgaged property, and was finally discharged from his trust; that appellee also received his discharge prior to the expiration of the time allowed by law for redeeming from the sheriff's sale.

We regard this reply as good. If, as is alleged, no claims were proved against the appellee, then there were no creditors to whom the property or its proceeds could go. The title taken by the assignee was only for the benefit of creditors. He acquired title for a specific purpose, and when that was accomplished his title ceased. It is true, that the adjudication in bankruptcy divested the bankrupt of title, but this divestiture was for a designated and fixed purpose, and with the accomplishment of that purpose the rights of the

Boyd v. Olvey.

assignee terminated. But there must have been ownership residing in some person when the trust ceased. Clearly enough that person is the original owner and creator of the trust. It is a familiar rule that where the purposes for which a trust was created are fully accomplished, the property remaining in the hands of the trustee reverts, without a formal conveyance, in the creator of the trust. This principle was applied by the Supreme Court of Michigan to a case of property in the hands of the assignee after the discharge in bankruptcy. *Steevens v. Earles*, 25 Mich. 40. It was there said: "It is a principle of law, independent of statute, that the estate of a trustee who receives land for particular purposes, terminates when they are fulfilled. BAYLEY, J., in *Doe d. Player v. Nicholls*, 1 B. & C. 336, says: 'It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and, therefore, as soon as the trusts are satisfied it will vest in the person beneficially entitled to it. *Doe v. Simpson*, 5 East, 162, and *Doe v. Timins*, 1 Barn. & A. 530, are authorities upon that point.'" The rule that a bankrupt is entitled to property remaining in the hands of the assignee after the trust is finally settled, is maintained in the following cases: *Cromwell v. Comegys*, 7 Ala. 498; *In re Lathrop*, 3 Benedict, 490; *Colie v. Jamison*, 4 Hun, 284; *Dewey v. Moyer*, 9 Hun, 473. This last case is affirmed in *Dewey v. Moyer*, 72 N. Y. 70, although the point upon which we here cite it was not discussed. The reply shows that the purposes of the trust were fully accomplished, and the trust estate, with all matters connected with it, finally settled by the adjudication of a court of competent jurisdiction, and this brings the case fully within the rule.

The title of the assignee is, for the purposes of the trust, an absolute one. The divestiture of the bankrupt is complete, but upon the termination of the trust the law restores to him so much of the property as remains undisposed of, and he is remitted to his original rights. This restoration, however,

Boyd v. Olvey.

can not take place until the full execution of the trust, for until that period all title is in the assignee. This case falls clearly within the statement of the court in *Roberts v. Shroyer*, 68 Ind. 64, that "It may be possible that, in some rare instances, circumstances may occur during the progress of the settlement of the bankrupt's estate, which would render it equitable that the title should be revested in him; but this by no means proves that the title of the assignee is not absolute."

An assignee takes title for a specific purpose, and for that purpose takes an absolute title. His title is as complete as that of one administering a legal trust can possibly be. A title may for a specific purpose be an absolute one, and yet with the accomplishment of the purpose pass to another without a formal conveyance. No conditions limited the assignee's title; he had full, unlimited right to alienate for the purposes of his trust, but his title might terminate by the accomplishment of the purposes for which it was vested in him. No limitations or conditions, in the true sense of the term, are imposed upon his title, although such there are upon his powers and duties, but with the complete execution of the trust his title ceases. While he held it there was no condition; when the purpose for which he received it was fulfilled his title terminated.

The court permitted the appellee to prove by the banker with whom the clerk had deposited the money received from the appellee, that the bank was ready and willing to pay the clerk's check in gold or in legal tender notes. We think this testimony, even if incompetent, could not possibly have injured the appellant.

The appellant put in evidence the judgment of the United States District Court adjudging the appellee a bankrupt. Appellee introduced a transcript of the proceedings in that court, showing the appointment of the assignee, his report, its confirmation and his discharge, and showing also the final discharge of the bankrupt. The report of the assignee is not set

Boyd v. Olvey.

out, and we are not directly informed by the record what disposition was made of the real estate in controversy. The only intimation we can catch is that contained in that part of the register's report which reads thus: "And it appearing that said assignee has no assets belonging to the bankrupt estate, and his account for services having been examined and found correct, and there being no opposing interest, it is ordered that said account be allowed, and said assignee discharged. The assignee reports the gross assets that have come to him, none; gross indebtedness proven on which the bankrupt was liable as principal, none." It is also stated by the register that the bankrupt fully complied with the requirements of the law.

It appears, therefore, that the appellee had complied with the law; that the property here in controversy never came into the hands of the assignee as assets, and that both bankrupt and assignee were discharged and all matters finally adjudicated. The judgment of discharge is a conclusive adjudication, and can not be impeached in a collateral action. *Wiley v. Pavey*, 61 Ind. 457 (28 Am. R. 677); *Shawhan v. Wherritt*, 7 How. 627; *Reed v. Vaughan*, 15 Mo. 137. The judgment is conclusive, not simply as to the fact that the bankrupt was discharged, but it also conclusively establishes the fact that he was entitled to a discharge.

The judgment of the district court conclusively determines the fact that the assignee had performed his duties, was entitled to a discharge, and that the estate was finally settled. Involved in this adjudication is the subordinate matter that the property here in dispute was never assets in the hands of the assignee. There can be no doubt as to this, because the fact was so stated in the assignee's report, was so referred to in the register's certificate, and was thus brought before the court for consideration, and it was considered and determined by the judgment confirming the report and discharging the assignee. Whether the property never became assets because there were no creditors, or for some other cause, is

Trippe v. Hunccheon *et al.*

not for us to enquire. It is no part of our duty, nor is it within our power, to enquire upon what grounds the bankrupt court determined that the property never became assets in the hands of the assignee. Our power ends with the discovery of the judgment of the district court declaring this fact. We find it conclusively settled that the property which appellee sought to redeem was not assets in the hands of the assignee, and only one conclusion can be drawn, and that is, that the appellee's rights are restored to him.

It is said that the record shows that costs were unpaid, and that the bankruptcy matter was, therefore, not finally settled. The district court has, by its judgment, declared that the matter is finally settled, and that ends all reasonable debate.

Judgment affirmed.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 8172.

TRIPPE v. HUNCHEON ET AL.

82	307
149	61

DRAINING ASSOCIATION.—*Corporation Debts.*—*Judgment.*—*Individual Liability.*—*Statute Construed.*—A complaint against members of an association formed under the act of June 12th, 1852, authorizing the construction of levees and drains, and the supplemental act of June 4th, 1861, to enforce their liability for the debts of the corporation, under sec. 4 of the act of March 4th, 1859, in which the plaintiff claims as assignee of a judgment for the debt, rendered against the corporation, and sets out an assignment of the judgment to him, and a bill of particulars of the services for which the judgment was rendered, must be regarded as a suit on the judgment.

SAME.—*Stockholders' Liability.*—The liability of the members of the association, in such case, is not for the judgment, but for the original debt, as individuals and not as corporators, and a complaint against them founded upon the judgment against the corporation is bad on demurrer.

From the Laporte Circuit Court.

Trippe v. Hunccheon et al.

S. L. Trippe, for appellant.

M. H. Weir, W. B. Biddle, W. D. Foulke and J. L. Rupe,
for appellees.

MORRIS, C.—The appellant, who was the plaintiff below, stated in his complaint, that on the 19th day of December, 1873, Edwin G. McCullom recovered a judgment in the La-porte Circuit Court against the Kankakee Valley Draining Company, for \$2,553.16, which still remains unpaid and unreversed; that said judgment was recovered for work and labor performed by said McCullom as the secretary of said company, and that said judgment was duly assigned to the appellant, on the 9th day of January, 1878; that, when the judgment was rendered, each and all of the appellees were members of said company and had been from its organization; that the company was a corporation, organized December the 16th, 1868, by virtue of an act of the Legislature of Indiana, authorizing the construction of levees and drains, approved June 12th, 1852, and an act supplementary thereto, approved June 4th, 1861, and that by the 4th section of the act of March 4th, 1859, all the appellees were made liable for the debts of said company.

It is further stated that McCullom's claim was a debt contracted by said company, and that said judgment is the debt of the company and the appellees; that the appellees were members of said company from December the 16th, 1868, until its dissolution on February the 2d, 1875; that the appellees subscribed, and caused to be recorded in said county, articles of association under the laws aforesaid, on the 30th day of December, 1868; that on the 24th day of March, 1871, said company, by its board of directors, adopted as supplements to its original charter, to take effect from April the 1st, 1871, the provisions of the act approved February 23d, 1871, authorizing the construction of levees, etc.; that on the 7th of May, 1873, the appellees organized said company under the act of March the 10th, 1873, and that it continued to

Trippe v. Hunccheon *et al.*

be a corporation *de facto*, under the laws of the State, until February the 2d, 1875, when it was dissolved and its franchises declared forfeited by order of the Laporte Circuit Court. A transcript of the judgment declared on and of the proceedings by which the corporation was dissolved, and copies of the original articles of association of the company, the resolution of the board of directors adopting the act of February 23d, 1871, and of the proceedings by which it is alleged that the appellees organized under the act of March the 10th, 1873, were filed with the complaint.

The appellees demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the appellant electing to stand by his pleading, final judgment was rendered in favor of the appellees.

The only error assigned is the ruling of the court upon the demurrer.

The appellant insists that the exhibits filed with his complaint do not constitute a part of it, and can not be considered by the court in passing upon the demurrer. We think that the articles of association by which the Kankakee Valley Draining Company was organized originally, and the papers by which it is claimed that the appellees organized under the act of March the 10th, 1873, may be regarded as a part of the complaint. The other exhibits are not part of the complaint.

We also think that the complaint, with the articles of association filed with it, sufficiently shows that the Kankakee Valley Draining Company was a corporation created and existing under the laws of the State.

The appellant says: "There is nothing to show that the Kankakee Valley Draining Company was within the saving clause of the act of December the 14th, 1872, consequently it must be presumed that this company went out of existence as a corporation, except as continued by operation of the general law for three years, the time necessary to close up its business. The complaint alleges, and the demurrer admits, a reorgan-

Trippe v. Hunccheon et al.

ization of the company under the law approved March the 10th, 1873, which was in force at the rendition of the judgment. In the absence of anything showing the contrary, it will be presumed that the original claim on which the judgment was rendered, accrued after the reorganization of the company in 1875."

It is not alleged in the complaint that the contemplated work of the original corporation, organized in 1868, did not exceed sixteen miles in length. It must, therefore, be held to have ceased to exist as a corporation from the time the act of the 14th of December, 1872, took effect. *Cooper v. Arctic Ditchers*, 56 Ind. 233.

It appears from the complaint that the Kankakee Valley Draining Company continued to do business after the act of 1872 took effect, as it had before. It is alleged in the complaint that the appellees organized themselves as a corporation under the act of March the 10th, 1873, by the name of the original company. It is this new corporation for which, the appellant claims, the services of McCullom were rendered, and its members, the appellant insists, are liable to pay the judgment mentioned in the complaint.

Assuming that the organization of the appellees as a corporation under the act of 1873 is sufficiently averred in the complaint, they would be liable, as members of the corporation, only for such debts as had been contracted by that corporation. It is nowhere alleged in the complaint that the services of McCullom were rendered for the new corporation. The inference, from the facts stated is, that the services for which the judgment was obtained, were rendered for the old company. McCullom recovered \$2,553.16 for services as secretary of the company. The act of 1873 provides for the election of a clerk. The judgment at most could only have included the value of services rendered by McCullom for the new company between the 17th of May, 1873, the time it was organized, and the last of November, 1873, the time of the commencement of his suit.

Trippe v. Huncheon *et al.*

But it is urged that the judgment in favor of McCullom is, if not conclusive, *prima facie* evidence of a debt contracted by the new company—that it is a debt itself within the meaning of the 26th section of the act of 1873, upon which the appellees are liable, and by which they are bound. The 26th section of the act is as follows:

“The members of every such association shall be individually liable for all debts contracted by, and all damages assessed and accrued against the association during their membership.”

This imposes upon the members of such a corporation, as individuals, not as corporators, an absolute, primary obligation to pay all debts contracted by the company of which they are members. Their liability is created by the statute, and is distinct from any obligation which they, as corporators, owe to the corporation or its creditors. The corporation has nothing to do with this liability, nor has it the right or the power to represent its members as to this individual obligation. It is a matter between the creditors of the corporation and its members, not as corporators, but as individuals.

In the case of *Allen v. Sewall*, 2 Wend. 327, SAVAGE, C. J., says: “Individual liability in the act must be understood in contradistinction to corporate liability, and the defendants must therefore be held responsible to the same extent, and in the same manner as if there was no act of incorporation. The plaintiffs undoubtedly might have sued the corporation, but they had their election under the 6th section of the act to consider the association an unincorporated copartnership. It is true that the plaintiffs should have brought their suit against all the copartners, as this is an action *quasi ex contractu*; but this error of the plaintiffs can be taken advantage of only by plea in abatement.” The 6th section of the statute alluded to by the court is as follows:

“And be it further enacted, that the members of the company shall be liable individually in the same manner as carriers at common law, for the transportation of all goods,

Trippe v. Huncheon *et al.*

wares and merchandise delivered to the agents of said corporation, and for all contracts which shall be made by such agents relating to the business of the corporation."

The above case has been approved by this court in the case of *Shafer v. Moriarty*, 46 Ind. 9, and the same construction given to the 16th section of the act of 1869, which is the same as that under consideration.

In the case of *Miller v. White*, 50 N. Y. 137, it was held that the trustees of a manufacturing corporation are neither parties nor privies to a judgment against the corporation, and that when, in consequence of a failure to make and file an annual report as required by law, they become liable to pay the debts of the corporation, and an action is brought against them to enforce that liability and collect a debt due from the corporation, proof of the recovery of a judgment thereon against the corporation is neither conclusive nor *prima facie* evidence of the debt. See also *McMahon v. Macy*, 51 N. Y. 155.

The appellant insists that these cases have been modified by the case of *Hastings v. Drew*, 76 N. Y. 9. This suit was a proceeding in the nature of a creditor's bill, the object of which was to reach property in the hands of the stockholders of the corporation, which belonged to the corporation, and had been distributed by it among its stockholders. The court held that in a suit against the corporation the stockholders, as to the property of the corporation, which was trust property, in their hands, were represented by the corporation, and that a judgment rendered against it in such suit was at least *prima facie* evidence against the stockholders. But the question in this case was altogether unlike the questions involved in the cases of *Miller v. White* and *McMahon v. Macy*. The court very properly distinguished the cases.

In the case of *Southmayd v. Russ*, 3 Conn. 52, the court held, upon a provision in the charter of a manufacturing corporation, that "the persons and property of the members of said corporation, shall, at all times, be liable for all debts due

Trippe v. Huncheon *et al.*

by said corporation," that the object of the provision was to leave the members liable as original undertakers and partners, precisely as if no corporation had existed, and that they must be sued directly upon the contract.

The same doctrine is held in the case of *Bohn v. Brown*, 33 Mich. 257, cited by the appellant.

The statute of Michigan makes the stockholders of certain corporations liable, jointly and severally, in their individual capacity, for all labor performed for such company, and any debt contracted while the directors were in office, and the other members remained stockholders, in case the directors should declare or pay a dividend when the company was insolvent. The statute further provided, that the members should not be sued individually until judgment had been obtained against the company, and an execution returned thereon unsatisfied, in whole or in part, or until the corporation should have been dissolved.

In speaking of what constitutes the cause of action against stockholders, under these provisions of the statute, the court says:

"The right to sue the stockholder is just as broad, or more precisely, the causes of action on which he may be held are just the same, in case the corporation is dissolved, as in case it is not. * * * The statute throughout assumes the existence of a cause of action against the stockholders prior to judgment against the company, and in case the corporation is not dissolved, requires the proceedings against the company as preliminary to a suit against the stockholder, not to bring into existence a cause of action against him, but, among other things, to collect of the corporation itself, if practicable, before going against the stockholder. The fundamental ground of action against the stockholder is, then, the original cause of action against the company, and the proceedings against the corporation, when it is not dissolved, are matters of inducement."

The court says that, upon the trial, the judgment against

Trippe v. Huncheon *et al.*

the company might be used as evidence against the stockholder, but says that the decision of that question is not necessary. In agreement with these cases, are the following: *Deming v. Bull*, 10 Conn. 409; *Mokelumne Hill Canal, etc., Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646.

There are several cases in this court in which suits like this have been sustained, but the question raised in this case was neither presented nor examined. In *Ward v. Polk*, 70 Ind. 309, the suit was against the members of a corporation. The complaint was in three paragraphs. The first was on the original contract with the company; the second was a *quantum meruit*; the third was upon a judgment against the company. The court says: "No question arises upon the complaint." Nor was the question raised in the case of *Reeder v. Maranda*, 66 Ind. 485, though the court held that the complaint must show that the defendants were members of the corporation at the time the work was performed. The same may be said of the case of *Todhunter v. Randall*, 29 Ind. 275. We know of no case where the question has been presented to and decided by this court. In the case of *Marion Township Union Draining Co. v. Norris*, 37 Ind. 424, the liability of the members of such corporations is held to be unconditional and primary.

In this and similar cases, by becoming members of the corporation, such members impliedly agree that, as individuals, they will pay all debts contracted by the corporation, and to this agreement its creditors become parties. It is upon this obligation that the creditor, who seeks to charge the members of the corporation as individuals, must sue—not upon a judgment obtained against the corporation. As to this individual obligation, the corporation does not represent its members.

We think the court did not err in sustaining the demurrer to the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion,

Trippe v. Hunccheon *et al.*

that the judgment below be affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

MORRIS, C.—The appellant insists that this action is not, as the court held, based upon a judgment against the corporation, but upon the original indebtedness and the undertaking of the stockholders as individuals, to pay the debts of the corporation. We have re-examined the amended complaint, as set forth in the amended transcript, and we are satisfied that the action is upon the judgment, and not upon the original indebtedness of the corporation.

The appellant sues as the assignee of the judgment; he sets out the assignment, and avers that the appellees are liable upon it. True, he avers that the judgment was for services rendered to the corporation, and sets out an account of such services, but the action is not founded upon the account, but upon the judgment.

Where a judgment is declared upon as the cause of action, it is conclusive between the parties to it. We do not think the judgment in this case against the corporation could be held to be conclusive against the stockholders when sued individually for the debts of the corporation. It is not the cause of action upon which they are liable to be sued. No one would pretend that the individual liability of the stockholder for the debts of the corporation, which is primary, would be merged in a judgment against the corporation for such debts. Whether the judgment against the corporation for its indebtedness could be used in evidence against the stockholders when sued individually for such indebtedness, is another question which we need not decide; but it is certain, we think, that the cause of action, the original indebtedness, still exists as a cause of action against the stockholders, notwithstanding the judgment against the corporation, that it is not merged in such judgment, and upon it the stockholders are individually liable. And to this we understand the ap-

Nye v. Lowry et al.

pellant to agree. But if the judgment against the corporation is to have the effect of a judgment against the stockholders individually, it would seem that as to him the cause of action upon which the judgment is rendered must be held to be merged in it, and that the stockholder is no longer liable upon it. This is not the law. The liability of the stockholder is primary, and he may be sued upon the original indebtedness though it has been put in judgment against the corporation.

PER CURIAM.—The petition for a rehearing is overruled.

No. 8702.

NYE v. LOWRY ET AL.

82	316
151	35
82	316
155	500
82	310
102	164

WITNESS.—*Parties.*—*Contract with Ancestor Concerning Land.*—*Cross Petition.*—*Partition.*—In an action for partition between heirs of a common ancestor, wherein one of the defendants files a cross petition, claiming the exclusive ownership of a part of the land, by virtue of a grant from the ancestor, he may call a co-defendant to the original petition as a witness to the execution of the grant. In respect to the cross petition, such co-defendant is an opposite party.

DEED.—*Execution.*—*Signature.*—It is not necessary that the grantor in a deed write his own signature, or make his mark. It may be done by another at his request, or he may adopt his name as written by another as his signature.

SAME.—*Delivery.*—If a deed be delivered by the grantor to A., for the benefit of B., it is a good delivery.

PRACTICE.—*Evidence Admitted Out of Order.*—It is in the discretion of the court to admit evidence out of its regular order.

From the Pulaski Circuit Court.

J. C. Nye, for appellant.

G. Burson and W. Spangler, for appellees.

WOODS, J.—The appellant brought into the circuit court her petition for partition, alleging that she and the appellees

Nye v. Lowry *et al.*

were children of common ancestors, who had died intestate, the owners of the real estate described.

The defendants severed in their pleadings, as follows, to wit:

John D. Lowry, besides denying the petition, filed a cross complaint against the plaintiff and his co-defendants, claiming to be the sole owner of a specified part of the lands in question.

Malinda Burson and Robert Lowry denied the petition, and also filed a cross bill, wherein they claimed to be the sole owners, as tenants in common, of a certain other part of the lands described in the petition.

McDonald S. and James Lowry joined in a denial of the petition, and of the cross petitions of John D. Lowry and Malinda Burson and Robert Lowry, and filed a counter-claim, in which they claimed to be the sole owners, as tenants in common with each other, of certain other parts of the land in dispute.

The issues joined between the parties upon these pleadings were submitted to a jury, which returned verdicts for the defendants upon their respective cross complaints, and against the plaintiff upon the issues joined upon her petition.

Upon the trial, for the purpose of establishing the truth of their respective cross bills, the defendants Malinda Burson and Robert Lowry and John D. Lowry were permitted to show by their co-defendant McDonald S. Lowry, that certain deeds, made by their father and mother, or purporting to be so made, were delivered by the grantors in their lifetime to the witness for the use of the several grantees therein named.

The appellant insists that it was not competent for these defendants to call their co-defendant to testify for them against the plaintiff, and that the witness was incompetent to testify concerning occurrences prior to the death of the ancestor.

The objection to the competency of the witness is based on the following proviso of the act defining who may be witnesses:

"And provided further, That in all suits by or against heirs, founded on a contract with or demand against the ancestor,

Nye v. Lowry et al.

the object of which is to obtain title to or possession of land or other property of such ancestor, or to reach or affect the same in any other way, neither party shall be allowed to testify as a witness to any matter which occurred prior to the death of such ancestor, unless required by the opposite party or by the court trying the cause." Act of March 11th, 1867, 2 R. S. 1876, p. 132.

Our opinion is that the court did not err in admitting the testimony complained of. In respect to the matter about which he was examined, the witness was an opposite party, and upon the theory of the appellant's complaint, had an opposite interest to those who called him.

In respect to his counter-claim, John D. Lowry was sole plaintiff, and all the other parties, including the witness, were defendants; so that for the purpose of showing the execution of the deed on which the counter-claim was based, the witness, by the very terms of the statute, was competent to be called by the opposite party. And for the purpose of proving the execution of the deed on which they based their counter-claim, it was for the same reason equally competent for Malinda Burson and Robert Lowry to call the same witness.

The witness also testified to the delivery of the deed under which he and his brother James claimed to own a part of the lands in question, and had the plaintiff objected separately to this part of the testimony or moved to strike it out, a more difficult or at least a different question would have been presented. No such objection or motion was made.

The further objection made to this testimony is on the ground that it was offered in rebuttal, when it ought to have been given, if at all, as original evidence.

If the objection were true in fact, it would afford no cause for reversing the judgment. It is in the discretion of the court to admit further evidence at any stage of the trial, giving the opposite party an opportunity to meet it; and if, therefore, any error can arise on account of admitting evidence out of the proper order, it must be for a manifest abuse of

Nye v. Lowry et al.

discretion, or from the refusal of the court to give the opposite party a reasonable opportunity to refute such evidence. No such refusal, or abuse of discretion, is shown in this record.

The appellant further insists that the evidence does not show the execution of the deeds, under which the defendants claim to own, among them, the entire property. On this point the appellant requested an instruction which the court refused, to the effect that "If some one other than the grantors signed the names of the grantors to the deeds that have been read in evidence, and the grantors did not sign said deeds by making their marks thereto, the deeds were not duly executed, are void, and should not be considered as evidence in the case."

Counsel cites the provision of the statute that "Conveyances of land, or of any interest therein, shall be, by deed in writing, subscribed, sealed and duly acknowledged by the grantor, or by his attorney," and insists that the grantor must sign with his own hand, by making a mark at least, if not by writing the entire signature.

Besides the provision referred to by counsel, the ninth clause of the act in relation to the construction of statutes and the definition of terms, is as follows:

"The words 'written' and 'in writing' shall include printing, lithographing, or other mode of representing words and letters. But in all cases where the written signature of any person is required, the proper handwriting of such person or his mark shall be intended."

These statutes, when properly interpreted, do not, in our opinion, require us to adopt the conclusion contended for by the appellant. The capacity to make a deed may exist without the ability to handle or touch a pen. It is enough if the mark of the grantor be affixed, and this mark may be made by another at his request; and, this being so, it would be the extreme of absurdity to hold that the true name, written out in full by another at the grantor's request, would not be sufficient.

Nye v. Lowry et al.

In our opinion, the signature of the grantor in a deed, written by another at his request, or, though written without his knowledge, if adopted by him as his own, has the same validity as if written by his own hand—indeed, within the meaning of the law, it becomes his proper handwriting, and the deed so signed is of the same validity as if written by his own hand; and the deed so signed, acknowledged and delivered, if subject to no other vice, is in all respects effective. See *Reed v. Watson*, 27 Ind. 443; *Shank v. Butsch*, 28 Ind. 19. These cases are not fully in point, but throw some light on the subject.

Some question is also made as to what constitutes a delivery. "It is much a question for the jury in each particular case. A deed may be delivered by words without actions, and by actions without words. 7 Petersdorff, 660. It may be delivered without being actually handed over. Chit. Cont. 3. If once delivered, its retention by the grantor subsequently, does not divest the title of the grantee. *Connelly v. Doe*, 8 Blackf. 320." *Dearmond v. Dearmond*, 10 Ind. 191; *Burkholder v. Casad*, 47 Ind. 418; *Fewell v. Kessler*, 30 Ind. 195; *Taylor v. McClure*, 28 Ind. 39. See also *Fesler v. Simpson*, 58 Ind. 83, and cases cited.

The evidence tends strongly to show that the deeds in question were made for the purpose of effecting a family settlement, or distribution of the property of the ancestors among those of their children on whom they wished to bestow their bounty, or for whom they desired to provide, and were delivered to one of the grantees for the use of all.

The evidence also tended to show the mental capacity of the grantors at the time of making and delivering the deeds; and there is no respect in which there can be said to be such a want of evidence to support the verdict, as to authorize an interference by this court to set it aside.

Judgment affirmed, with costs.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

Pidgeon v. McCarthy *et al.*

No. 9700.

PIDGEON v. MCCARTHY ET AL.

CITIES AND TOWNS.—Additions.—Reservations.—Marks on Plats.—Where a plat into lots is made of an addition to an incorporated town or city, and reservations for any purpose are marked on such plat, the intention of the proprietor of such plat in regard to the meaning of the marks on such reservations is in general a question of fact, and not of law.

SAME.—Borough of Vincennes.—General Harrison's Reserve.—Where it appears that General William Henry Harrison, in 1816, made a plat of an addition to the borough of Vincennes, and marked on the plat of such addition one of the lots therein with the words "*General Harrison's Reserve*," and where it also appears that such lot, so marked, was thereafter assessed for taxation for municipal purposes by the borough, town and city of Vincennes, in their successive corporate capacities, and where it further appears that for nearly sixty years such municipal taxes so assessed on such lot had been paid to the proper officer of the existing corporation by the successive owners of such lot.

Held, that, from these facts and others of like import, the trial court properly stated, as its conclusion of law, that the lot in question was and is within the corporate limits of the city of Vincennes, and subject to taxation by the city authorities for municipal purposes, as other real estate within the city limits.

From the Sullivan Circuit Court.

H. Burns, for appellant.

H. S. Cauthorn and *J. M. Boyle*, for appellees.

HOWK, J.—This suit was commenced by the appellant against the appellees Peter R. McCarthy and the city of Vincennes, in the Knox Circuit Court. The object of the suit was to perpetually enjoin the city of Vincennes and the city treasurer from selling certain personal property of the appellant, which had been levied upon and was about to be sold for the payment of certain taxes, claimed to be due and owing from her to said city. In her complaint, the appellant alleged in substance, that she was the owner of certain real estate, particularly described, in Knox county, called and known as the "Harrison Place," and adjoining the city of Vincennes; that such real estate had never been annexed to,

Pidgeon v. McCarthy et al.

nor in any manner made a part of, nor included within the corporate limits of said city; that the officers of said city had, however, treated said real estate as being within the city limits, and for ten years prior to the filing of said complaint, had assessed the same for city taxation, and had charged such real estate with city taxes amounting in the aggregate to the sum of \$1,217.25; that the appellee McCarthy, as the city treasurer, for the purpose of enforcing the payment of said taxes by the appellant, had levied upon certain personal property belonging to her, and had advertised the same for sale. Wherefore, etc.

The cause having been put at issue on the appellant's application, the venue thereof was changed to the Sullivan Circuit Court. There the issues joined were submitted to the court for trial; and, at the request of the parties, the court made a special finding of the facts and of its conclusions of law thereon. The appellant excepted to each of the court's conclusions of law, and thereupon judgment was rendered against her for the appellees' costs, and that she take nothing by her suit herein.

In this court, the appellant has assigned, as error, that the trial court erred in each and all of its conclusions of law, upon its special finding of facts.

It is necessary to the proper presentation of this case, and of the grounds upon which the appellant asks this court to reverse the judgment below, that we should first give a summary, at least, of the facts specially found by the court, and of its conclusions of law thereon. The court found the facts specially, in substance, as follows:

1st. That, by an act of the Legislative Council and House of Representatives of the Indiana Territory, entitled "An act to incorporate the borough of Vincennes," approved September 5th, 1814, such parts of the town of Vincennes as are within the following limits, to wit: the plantation of William Henry Harrison on the northeast, the Church lands on the southwest, the river Wabash on the northwest, and the lines of the

commons, as laid out for the inhabitants of Vincennes, in pursuance of an act of Congress, in all the other parts to and sides thereof, were erected into a borough by the name of the "Borough of Vincennes;" that there should be nine trustees of the borough, who should be residents and freeholders or householders therein, and be elected annually, commencing on the first Monday in February, 1815.

2d. That, in 1816, William Henry Harrison laid off an addition to said borough, which was sworn to by him and recorded in the recorder's office of said Knox county, and is marked "Plan of Harrison's addition to Vincennes"; that the addition is a part of upper prairie surveys 1, 2, 3 and 4, adjoined Vincennes on the northeast, contained 59 acres, and was bounded on the southwest by Hart street, on the northwest by the river Wabash, on the northeast by Hickman street, and on the southeast by Trotter street, now known as Seventh street; and that the property in question is within the above limits. The addition is laid off into lots, numbered to 209, inclusive, but not all of the same size. The place in question is bounded on the southwest by Scott street, on the northwest by the river Wabash, on the northeast by Perry, now Harrison, street, on the southeast by Parke street, and is marked "General Harrison's Reserve," and contains between three and four acres, without showing whether reserved from sale or from the addition. The territory, on all sides, is laid off and platted into lots. One-half of one square is marked "Judge Parke's Reserve"; and another half-square, opposite the latter, is left blank, without number or other designation.

3d. That, by an act of the General Assembly of this State, entitled "An act to add the lots lately laid out by General William Henry Harrison, to the borough of Vincennes," approved January 3d, 1817, it was enacted in substance, as follows:

Sec. 1. Be it enacted, etc., that, from and after the passage of this act, all the lots laid out by General William Henry Harrison, adjoining the borough of Vincennes, to wit: bounded

Pidgeon v. McCarthy et al.

on the southwest by the said borough of Vincennes, on the northwest by the Wabash river, on the northeast by lands of — Lunnion, and on the southwest belonging to said William Henry Harrison, and lying on Hickman, Trotter and Hart streets, shall be added to, incorporated in and constituted a part of the borough of Vincennes; and the trustees of the borough of Vincennes shall at all times hereafter have and enjoy all the rights, privileges and immunities which they now enjoy, in and over the borough aforesaid; and the citizens now resident within the boundary hereby added to the borough of Vincennes, and all such which may hereafter settle therein, shall have and enjoy the same rights and privileges which the citizens now resident within the said borough of Vincennes are or may be entitled to have and enjoy.

4th. That, by an act of the General Assembly of this State, entitled "An act respecting the borough of Vincennes," approved January 27th, 1836, it was enacted, in substance, as follows:

Sec. 1. The president and board of trustees of the borough of Vincennes shall be and are declared a body corporate and politic, by the name and style of the president and trustees of the borough of Vincennes.

Sec. 12. The bounds of said borough shall be according to the survey, including Harrison's addition, which was filed in the office of the clerk of the board of trustees for said borough on April 16th, 1821.

Sec. 20. The plat of said borough, now on file in the office of the clerk of the late board of trustees of said borough, shall be recorded by the recorder of Knox county, sixty days after the adoption of this act.

Sec. 18. The said borough of Vincennes shall be divided into four wards, * * * and the fourth or upper ward to contain all between Perry street and the northeast boundary of Harrison's addition.

The survey named in said act was recorded by the recorder of Knox county, in a record of his office, and the lot de-

scribed in the complaint is within the territorial limits and boundaries described in said survey, and the survey omits the words "General Harrison's Reserve," and has marked simply "Wm. H. Harrison."

5th. The said corporation continued and acted as such until in 1856, when it became incorporated as a city under the general law of the State for the incorporation of cities, by the name of the city of Vincennes, and still was a city corporation under the laws of the State.

6th. Under sections 84 and 85 of the general law of March 9th, 1857, for the incorporation of cities, the common council of said city presented to the board of commissioners of Knox county, at its — term, 1858, a petition for the annexation of certain territory, within certain boundaries, to said city, which petition was duly verified, and accompanied by a map or plat accurately describing the territory proposed to be annexed; and it appearing to the board that the common council had given thirty days' notice, by publication in the *Western Sun*, a newspaper printed and published in the city of Vincennes, of the petition, and stating in the notice the territory sought to be annexed; and all things in the premises being duly considered by the board, the prayer of the petition is granted, and it is ordered and decreed by the board, that the territory described in the petition be annexed to the city of Vincennes, and that an attested copy of this order be filed with the clerk of the Knox Circuit Court. The territory lying next adjoining the city on the southeast and northeast was annexed by order of said county board, whereof an attested copy was filed in the Knox Circuit Court, and the city has exercised authority and jurisdiction over all the territory described in said order, with the acquiescence and consent of the people residing therein.

7th. On June 29th, 1821, General William Henry Harrison executed a conveyance to his son, John C. S. Harrison, of the real estate described in the complaint, describing the same in his deed as "lying and being in the borough of Vincennes,"

Pidgeon v. McCarthy et al.

etc.; that the said lot is the lot on which the plaintiff now lives, and has been owned by her since December 28th, 1861; that she derives title to said lot through and under divers deeds from persons, who each derived title thereto through and from said Harrison and his son; that in all of said deeds, through and under which she claims, the lot in question is described as being in the borough of Vincennes, while it was a borough, and in the city, after it became a city.

8th. The lot has been assessed for taxes by the borough and by its successor, the city, ever since the year 1817; there are no records showing that any property was assessed by the borough for taxes, for previous years. The taxes so assessed were paid for the time so assessed, up to the year 1860, when the plaintiff became the owner, and the plaintiff paid the taxes from that time up to 1874, through William F. Pidgeon, her husband, when the taxes became delinquent, and now amount to \$1,217.25.

9th. That John C. S. Harrison resided on the lot in question from 1819 to and including 1828; that at the election for borough trustees, held next after the said John became the owner of said lot, in February, 1822, he was elected one of the trustees of the borough, and was annually thereafter elected as such, up to and including 1828, and acted as such trustee up to November 15th, 1828, and during part of the time was chairman of the board of trustees.

10th. That William F. Pidgeon is and was, while the plaintiff was the owner of the lot, the plaintiff's husband; lived with her on the place, and acted as her agent, since she was the owner; that since, and while they have resided on the place, William F. Pidgeon was elected a councilman from the sixth ward of the city, for two terms, of two years each, and served as such.

11th. That Benjamin Parke, in 1822, executed a deed to certain named persons for the place marked in Harrison's addition as "Parke's Reserve," and described the same as being in the borough of Vincennes, and that in all of the deeds

from the owners of said lots since said deed, the same has been described as being in the borough of Vincennes, while it was a borough, and as in the city of Vincennes, after it became a city.

12th. That General William Henry Harrison, on September 13th, 1816, executed a deed to Samuel T. Scott for the half-square opposite Parke's place, which is not numbered on the plat of Harrison's addition, but is known as "Scott's Block," wherein he described the same as in the town of Vincennes, and it is so described in all deeds by subsequent owners.

13th. That ever since the act of January 3d, 1817, the borough of Vincennes and the city of Vincennes, its successor, have exercised jurisdiction over the lot of the plaintiff, for municipal purposes, assessed and collected taxes, and the owners thereof have, by their acts and conduct, recognized that the same is within said borough and city, and acquiesced in such jurisdiction ever since said period, and exercised the rights of citizens.

14th. That Peter R. McCarthy, at the commencement of this suit, was city treasurer, having in his hands the tax duplicate, upon which was charged the sum of \$1,217.25, and, as such treasurer, levied on the property in the complaint mentioned, to make the same.

"And thereupon the court finds the following conclusions of law, based upon said findings of fact:

"1. The court finds for the defendants; and,

"2. That the premises in the complaint mentioned, to wit" (description), "are within the corporate limits of the city of Vincennes, Indiana, and have been before and from the time of the purchase of the complainant, and are and were from the date of said purchase, subject to taxation as other real estate in said city of Vincennes, and that the levy of said city by its officers, upon the property in the complaint mentioned, for the taxes due said city from complainant, on said land and personal property of complainant so found to be in the cor-

Pidgeon v. McCarthy *et al.*

porate limits of said city, is valid, and that the temporary restraining order be and the same is now dissolved, and that there is now due said city from the complainant the taxes in the answer mentioned, to wit, \$1,217.25."

(Signed) "H. D. SCOTT, Judge."

We are of the opinion that, upon the facts specially found, the court's conclusions of law were clearly right. The appellant claims that her lot, known as the "Harrison Place," is not and never was a part of Harrison's addition to Vincennes; and this claim is founded upon the fact, apparent on the plan or plat of said addition, that the lot in question is marked thereon as "General Harrison's Reserve." Upon this point, the appellant's counsel says: "General Harrison must have meant something by marking a certain parcel of ground as being reserved. What did he mean by the word 'reserve'? He must have meant that the parcel of ground so marked was to be reserved out of the addition, and not to be included therein. From what else could he reserve it?" It seems to us, however, that if General Harrison had meant or intended to reserve the lot in question from or out of his addition to Vincennes, he would not have included such lot in the plan or plat of his addition. He did mean something, no doubt, by marking the lot as his reserve; and what he meant is shown, we think, by his marking another lot as "Judge Parke's Reserve." In this latter case, he meant to indicate that the lot, so marked, was reserved for Judge Parke; and so, with regard to the lot marked as "General Harrison's Reserve," he meant to indicate by such mark, that he reserved such lot from sale for himself or his family.

It is manifest that this was General Harrison's intention in so marking the lot in question, from the fact found by the court, that within five years after he made his addition to Vincennes, to wit, on June 29th, 1821, he executed a conveyance to his son, John Cleves Symmes Harrison, of said lot, and described the same as "lying and being in the borough of Vincennes." It is evident, also, that General Harrison re-

garded the lot in question as a part of his addition to the borough of Vincennes, from the fact found by the court, that such lot was assessed for taxes by said borough from the year 1817, and by its successor, the city of Vincennes, and that such taxes were paid until 1874, during the first four years of which time, the lot was owned by General Harrison. It can hardly be supposed that he would have paid the borough taxes on the lot if he had intended to reserve, or had in fact reserved, such lot from his addition to said borough. Upon the facts found by the court, we are clearly of the opinion that the appellant's lot was not reserved from, but was in fact a part of Harrison's addition to Vincennes; that, as such part of said addition, the lot in question became a lot within the borough of Vincennes, under the act of January 3d, 1817, entitled "An act to add the lots lately laid out by General William Henry Harrison to the borough of Vincennes," and under section 2 of the act of January 27th, 1836, entitled "An act respecting the borough of Vincennes;" and that, being thus a lot within the borough of Vincennes, it became and was a lot within the corporate limits of the city of Vincennes, when the said borough became an incorporated city, under the general law of the State for the incorporation of cities, in the year 1856, and has since so continued.

This conclusion saps the foundation of the appellant's cause of action. For it is clear, that unless the appellant's lot was reserved from and formed no part of Harrison's addition to Vincennes, it became a lot within the limits of the borough of Vincennes, under the above entitled acts in relation to said borough; and, if it became a lot within said borough, it became of necessity a lot within the city, when the borough was incorporated as the city of Vincennes. We have shown, we think, that the lot was not reserved from, but was in fact a part of Harrison's addition to Vincennes; and, therefore, it follows that the lot became a part of the borough, and subsequently of the city, of Vincennes. This is so, without any reference to the annexation proceedings mentioned in the special find-

Scott et al. v. Ramsey.

ings of the court; and the questions in relation to the validity of those proceedings, which have been elaborately discussed by the appellant's counsel, seem to us to be wholly immaterial.

Upon the case as presented by the special findings of facts, it is clear to our minds, that the court did not err in its conclusions of law.

The judgment is affirmed, with costs.

NIBLACK, J., took no part in the consideration or decision of this cause.

No. 9168.

SCOTT ET AL. v. RAMSEY.

LANDLORD AND TENANT.—*Delivery of Produce as Rent.—Conversion.*—By the terms of a lease, a tenant agreed to deliver to his landlord one-third of the grain crop, in the bushel, in pens on the leased premises. Upon threshing the wheat the plaintiff presented himself with sacks and demanded the delivery of one-third of the wheat, which the tenant refused (the whole being then in one pile), but separated it into two parts, taking two-thirds himself, and delivering the remaining third to S., who had no right to it, and who hauled it away, the landlord protesting. In a suit by the landlord against the tenant and S. for conversion—*Held*, that the landlord was the owner of the wheat converted and could maintain the suit; that before separation of the wheat into parts the landlord and tenant were tenants in common thereof, and that when the tenant exercised his right to separate, and actually took two-thirds to himself in severalty, the landlord at once became sole owner of the other third.

From the Knox Circuit Court.

G. G. Reily, W. C. Johnson and W. C. Niblack, for appellants.

H. Burns, for appellee.

BLACK, C.—This was an action brought by the appellee against the appellants, Scott and Baker, for the conversion of a certain number of bushels of wheat.

Scott et al. v. Ramsey.

The cause was tried by the court, and, upon the request of the parties, the court stated the facts in writing, and the conclusions of law upon them, and judgment was entered accordingly, the appellants having excepted to the conclusions of law.

The only question before us is, whether or not the court erred in its conclusions of law.

The facts and conclusions of the special finding were as follows :

"On November 2d, 1878, the plaintiff, being the owner of a farm in Lawrence county, Illinois, three miles distant from Vincennes, Indiana, leased said farm to said Samuel Baker, by a written lease mutually executed by them, which is in the words and figures following :

"Whereas, Samuel Baker is now occupying, as a tenant, the farm of three hundred and sixty-seven acres, situated about three miles southwest of Vincennes, Indiana, and being in Lawrence county, Illinois, formerly owned by J. B. Julian and Martin Julian, and now owned by J. F. Ramsey : It is now agreed by Samuel Baker and John F. Ramsey, that all the ground already broken and fit for cultivation is to be put in corn, and cultivated in a good and farm-like manner by the said Baker ; and one-third of the product or grain, measured in bushels, is to be delivered by said Baker to said Ramsey, on the place, in pens. The ordinary repairing of fences, etc., is to be done by said Baker. Ramsey is to pay for any new rails or other permanent work ordered by him. It is the intention of this agreement that all land that can be is to be put in corn or grain ; but if the lessee is prevented cultivating portions of the land because of an unfavorable season, he is not to be held responsible therefor. Whatever new fencing may be necessary for the protection of the crop is to be paid for by Mr. Ramsey. The lessee agrees to give possession of said land on the 1st day of September, 1879, if notified so to do two months before that date ; and if possession is not demanded at that time, and the tenant holds pos-

Scott *et al.* v. Ramsey.

session after September 1st, 1879, then he agrees to give possession September 1st, 1880, if possession is demanded two months before that date.

“Witness our hands and seals this 2d day of November, 1878.

“J. F. RAMSEY, [Seal.]

“SAMUEL BAKER. [Seal.]’

“Pursuant to said lease, said Baker took possession of said farm and planted twenty-nine acres of the same in wheat, in the fall of 1878. In July, 1879, said Baker harvested the wheat grown on said twenty-nine acres, and threshed the same on said farm, the whole amount of the wheat so raised and threshed being 255 bushels. Said Baker was present at and superintended the threshing. The wheat was all threshed at one place and run from the machine into one pile, before any division thereof. The plaintiff was present at the threshing, with sacks, to receive the third of the wheat due him under the lease, of which said Baker then had notice; and when said threshing was finished, and before any division thereof, the plaintiff demanded of Baker the delivery to him of one-third of said wheat under said lease; said Baker refused to deliver to plaintiff said third or any part thereof. After said demand, and on the same day that it was made, the defendant Scott came with wagons, teams and sacks, to said wheat; whereupon said Baker divided said wheat, in the presence of the plaintiff, putting two-thirds thereof in sacks belonging to said Baker in one pile, as his share under said lease, and the remaining third in the sacks furnished by said Scott in another pile. Said Scott assisted in said division and hauled away and converted to his own use the third of said wheat put into his sacks as aforesaid. When said division was being made, said plaintiff notified said Scott that one-third of said wheat was due him under said lease, and forbade the removal by Scott of the wheat put into his sacks. Said Scott had no right or title to the third of the wheat received by him as aforesaid, or any part thereof. Said Baker kept and converted to his own use the two-thirds of said wheat put

Scott et al. v. Ramsey.

into his sacks as aforesaid. The plaintiff has received no part of said wheat or anything in payment or satisfaction of his right to one-third thereof. At the time that Scott received the third of said wheat from Baker, the market price of wheat at Vincennes, Indiana, was ninety-three cents per bushel, and three cents less at plaintiff's said farm, the difference being the cost of transportation per bushel from the farm to Vincennes, Indiana. The highest market price for wheat at Vincennes, Indiana, between the time said wheat was threshed and the time of the trial herein, was \$1.27 per bushel, and the corresponding market price at said farm was three cents less.

"The court finds the following conclusions of law from the foregoing facts:

"1. The provision in said lease, requiring said Baker to deliver to plaintiff one-third of the grain in pens on said farm, was for the benefit of said Ramsey, and he had the legal right to waive such delivery.

"2. By attending with sacks to receive the third of wheat due him, at the place where the wheat was threshed, and demanding of Baker the delivery there to him of said third, Ramsey waived the requirement to deliver the same in a pen or pens on said farm, and it became the duty of Baker to deliver to Ramsey his third of the wheat at the place where threshed; and the division of said wheat by Baker and the delivery of one-third thereof to Scott and retention of the other two-thirds by Baker were a waiver by Baker of any right to insist upon the delivery of one-third of said wheat in pens on the farm.

"3. Immediately upon the division of said wheat, the third placed in Scott's sacks became the property of Ramsey, and Scott, by taking and converting the same to his own use, and Baker, by aiding and abetting him therein, became jointly liable to Ramsey in damages for the taking and conversion of said third.

"4. The measure of the plaintiff's damages is the value at

Scott et al. v. Ramsey.

the time of taking, to wit: July, 1879, of one-third of said wheat, to wit: eighty-five bushels, at ninety cents per bushel, with six per cent. interest until this date, making in the aggregate, \$79.35."

Of the questions involved in the special finding, the only one argued by counsel is that of the ownership of the wheat taken by Scott, it being claimed on behalf of the appellants that the appellee never became the owner thereof, because there was no delivery to him by Baker as stipulated in the instrument under which it was demanded by the appellee, and, on the contrary, there was a refusal to deliver.

If the case were one to be governed by the rules applicable to the transfer of property in goods by sale or by way of payment in specific commodities, it would seem to be true that the appellee did not become the owner of any part of the wheat; for, in the separation thereof and the setting apart of the portions into which it was divided, there was no intention on the part of Baker thereby to transfer the ownership of any wheat to Ramsey. But, admitting that the written instrument executed by these parties was a lease, and that, under its provisions, Baker was a tenant of the land, yet, giving effect to the instrument according to its substantial meaning, Ramsey and Baker were tenants in common of the grain produced upon the land. In such a case of letting upon shares, the fact that it is made the duty of the lessee to divide the uncertain future products into the parts which are to constitute the shares, or the use of the word *pay, yield, give or deliver*, in making provision for such division, should not be permitted to change the real character of the relation of the parties as tenants in common of the crop. *Putnam v. Wise*, 1 Hill, 234; *Dinehart v. Wilson*, 15 Barb. 595; *Harrower v. Heath*, 19 Barb. 331; *Bernal v. Hovious*, 17 Cal. 542; *Lowe v. Miller*, 3 Grat. 205; *Smyth v. Tankersley*, 20 Ala. 212.

When Baker, as stated in the finding, exercised his right to separate and take to himself in severalty, two-thirds of the common property, and thereby made partition thereof, the

Wright v. The Board of Commissioners of the County of Tipton.

appellee became the owner in severalty of the remaining one-third.

We think the judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

No. 8686.

WRIGHT v. THE BOARD OF COMMISSIONERS OF THE
COUNTY OF TIPTON.

REPEAL OF STATUTE.—Conflict of Laws.—Construction.—The law does not favor the repeal of statutes by implication, and where two statutes are enacted upon the same subject by the Legislature at the same session, they should be construed together if possible; but, when they are irreconcilable, then the later supersedes the former, though they were both intended to take effect at the same time.

SAME.—Fees and Salaries.—County Auditor.—Drainage.—Section 16 of the act of 1875, 1 R. S. 1876, p. 433, concerning drainage, so far as it relates to the fees of the county auditor, was repealed by implication by the 11th section of the later act of the same year, concerning fees and salaries, 1 R. S. 1876, p. 467.

From the Tipton Circuit Court.

R. Vaile, J. F. Vaile and J. W. Robinson, for appellant.

R. B. Beauchamp and G. H. Gifford, for appellee.

FRANKLIN, C.—This action consists of a claim for services rendered under the drainage law of 1875, by appellant as county auditor of Tipton county.

The services were rendered in connection with the construction of a number of ditches in said county, the aggregate fees claimed for which amount to the sum of \$594.19.

The claim was disallowed by the county board of commissioners; an appeal was taken to the circuit court, where a demurrer was sustained to the cause of action; plaintiff excepted, declined to amend, and judgment was rendered on the demurrer for appellee.

89	335
127	300
82	335
148	21
149	516

Wright v. The Board of Commissioners of the County of Tipton.

The error assigned is the sustaining of the demurrer to the cause of action.

There is no objection made to the form of the cause of action, the rendition of the services, or the amount of fees charged. But the question presented is as to the liability of the county for the payment of the fees.

Appellant insists that the county is liable under the provisions of the 16th section of the drainage law of the State, approved March 9th, 1875, and appellee insists that it is not liable, according to the provisions of the fee and salary act, approved March 12th, 1875.

There is no emergency clause in either of these acts. They both took effect upon the same day by publication and distribution.

Appellant insists as both acts were passed by the same Legislature at the same session, and went into effect at the same time, they ought to be construed together as so many sections and parts of the same law; that statutes ought to be construed in relation to the time they take effect and not the time of their adoption. And in support of the last proposition, we have been referred to the case of *Evansville, etc., R. R. Co. v. Barbee*, 59 Ind. 592, and afterwards approved in *Evansville, etc., R. R. Co. v. Barbee*, 74 Ind. 169.

These decisions were upon the question as to within what time an appeal might be taken to this court, and grew out of the act of March 14th, 1877, limiting the time within which appeals might be taken to within one year as to causes thereafter tried, and to one year after the law took effect, as to causes theretofore tried, but not so as to extend the period beyond two years from the date of trial. In that case the trial was had May 14th, 1877; the law took effect July 2d, 1877; the appeal was taken June 27th, 1878, and this court held that it was within the time allowed by the statute,—that the time of the taking effect of the law should be construed to mean the time fixed by which to determine what trials had been had theretofore, and what thereafter.

Wright v. The Board of Commissioners of the County of Tipton.

In the opinion, in 59 Ind., upon the motion to dismiss, WORDEN, J., used the following language: "We think the law must be construed to speak from the time it took effect, as a will speaks from the time of the death of the testator; and that the words 'hereafter' and 'heretofore' have reference to that period of time."

This is doubtless a correct construction of that statute, but we do not think it applicable to the question under consideration; this is a question of conflict of statutes.

It is a correct doctrine that where two statutes are passed upon the same subject, by the same Legislature, at the same session, they should be construed together, and both allowed to stand if possible. The law does not favor repeals by implication; but where the statutes are in irreconcilable conflict with each other, then the later one approved supersedes the former; notwithstanding they both were intended to take effect and go into operation at the same time, the later must be regarded as the last expressed will of the Legislature, the same as the codicil of a will, although it takes effect the same time of the will, must be regarded as the last expressed will of the testator, and it supersedes any irreconcilable provision in the original will. *Indiana Central Canal Co. v. State*, 53 Ind. 575; *Hutts v. Hutts*, 62 Ind. 240.

The remaining enquiry is, as to whether there is an irreconcilable conflict between the two statutes. The 16th section of the drainage act, 1 R. S. 1876, p. 433, reads as follows: "The fees of the county auditor, treasurer, commissioners, viewers and reviewers, shall be the same as provided by law for like services in opening and establishing public highways, and shall be paid out of the general fund of the county." All other fees to be paid by the parties.

The 11th section of the fee and salary act, approved three days afterwards, 1 R. S. 1876, p. 471, reads as follows: "The auditor of each county shall be allowed the sum of fifteen hundred dollars per year for his services and no more, ex-

Wright v. The Board of Commissioners of the County of Tipton.

cept as provided in this act." It then provides for additional pay where the population of the county exceeds fifteen thousand, and that the salary be paid quarterly out of the county treasury.

The 12th section sets out a list of services for which the auditor may charge fees in addition to his salary. The fees embraced in this claim are not for such services as are embraced in that list. And the section concludes as follows: "For services rendered by the auditor in any matter litigated before the board of county commissioners, the same fees shall be taxed and collected by him as are allowed clerks for similar services, but no fees or charges for such services shall be charged against the county or paid out of the county treasury." The drainage law was drafted, considered, passed and approved under the theory of allowing the county auditor and other county officers fees for their services, and not a salary. When the salary law was afterwards passed, it provided for the salary paying for all services, except where fees were specifically authorized to be charged in addition to the salary, and even for such services the auditor was specifically prohibited from charging any fees against the county, or collecting any money from the county treasury therefor.

We think that these two statutory provisions in relation to the payment of such fees as are herein claimed by appellant, are in direct and irreconcilable conflict, and that the latter supersedes and repeals by implication the former; and that it was the intention of the Legislature in the passage of the fee and salary bill to allow the auditor fees for such services only as were specified, and that his salary should pay for all other services. The object of the salary part of the law was to cut off all extra and constructive fees, and fix a definite sum as a salary, except as was otherwise expressly provided for.

There was no error in sustaining the demurrer to the cause of action.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing

Baker v. McCune.

opinion, that the judgment of the court below be and the same is in all things affirmed, at appellant's costs.

WOODS, J., dissents.

No. 8656.

BAKER v. McCUNE.

MARRIED WOMAN.—Mortgage.—Redemption.—Judicial Sale.—Vendor and Purchaser.—Statute Construed.—Where during marriage a husband purchases lands, and gives a mortgage for purchase-money, the wife has, in consequence of section 2495, R. S. 1881, no inchoate interest in the land, as against the mortgagee, and, therefore, no interest vests in her, under section 2508, upon sale of the land under a decree of foreclosure against the husband alone, and in such case the purchaser may, upon suit against her, obtain a decree fixing a time within which she must redeem or be barred.

From the Whitley Circuit Court.

J. S. Frazer, W. D. Frazer and J. S. Collins, for appellant.
W. Olds and H. S. Biggs, for appellee.

NIBLACK, J.—Action by Elizabeth Baker against John McCune for partition.

The complaint averred that the plaintiff had been for more than thirty years, and then was, a married woman, and the wife of one Joseph Baker; that on the 7th day of December, 1876, the said Joseph Baker executed to the defendant, as the executor of the last will of Henry McCune, deceased, his mortgage conveying to the defendant, as such executor, a tract of land in Whitley county, containing one hundred and sixty acres, to secure the payment of the sum of two thousand and seven hundred dollars, with interest, that sum being the balance remaining due for unpaid purchase-money on said land; that the plaintiff did not unite in the execution of said mortgage; that, at the April term, 1877, of the Whitley Circuit Court, the defendant, as executor as aforesaid, re-

89	339
141	155
82	339
146	700
82	339
152	315

Baker v. McCune.

covered judgment against the said Joseph Baker for the aggregate sum of \$3,077.96, being the estimated amount then due which the mortgage was given to secure, and obtained a decree foreclosing the mortgage to satisfy said judgment; that afterwards, on the 22d day of December, 1877, the land was exposed to sale by the sheriff, under the decree of foreclosure, and the defendant became the purchaser for the amount then due for principal, interest and costs on said judgment; that, on the 26th day of December, 1878, the sheriff executed to the defendant a deed for the land in pursuance of the terms of his purchase, conveying to him, the defendant, all the title of the said Joseph Baker in and to the same; that said land was of the value of six thousand dollars, and no more; that by reason of the premises the plaintiff and defendant were tenants in common of the land so mortgaged by the said Joseph Baker, she being the owner in fee simple of one undivided third part thereof, and he being the like owner of the remaining two-thirds; that partition had been demanded and refused.

The defendant demurred to the complaint for want of sufficient facts, and at the same time filed a cross complaint, setting up with greater particularity the principal facts averred in the complaint, and praying a foreclosure of the mortgage as against the plaintiff.

The court sustained the demurrer to the complaint and rendered final judgment thereon upon demurrer in favor of the defendant.

The plaintiff, after final judgment as above, moved to strike out the cross complaint, but her motion was overruled. She then demurred to the cross complaint, but her demurrer was also overruled. Such further proceedings were thereupon had upon the cross complaint as resulted in a decree of foreclosure of the mortgage as against the plaintiff, and an order for the sale of the entire tract of land in case the plaintiff did not, within three months, redeem the same from the former sale.

The plaintiff has appealed and assigned error upon the de-

Baker v. McCune.

cision of the court sustaining the demurrer to the cross complaint, and upon the proceedings upon the cross complaint.

Section 31 of the act regulating descents and the appportionment of estates, which was in force at the time of the execution, as well as the foreclosure of the mortgage, reads as follows :

“ Where a husband shall purchase lands, during marriage, and shall, at the time of purchase, mortgage said lands to secure the whole or part of the consideration therefor, his widow, though she may not have united in said mortgage, shall not be entitled to her third of such lands, as against the mortgagee or persons claiming under him ; but she shall be entitled to the same as against all other persons.” 1 R. S. 1876, p. 413.

The act of 1875 neither enlarged nor abridged the inchoate interests of married women in the lands of their husbands. It simply provided, that in a certain contingency such inchoate interests as the law might, at the time, recognize as existing inchoate interests, should vest and become absolute in the wife, in the same manner and to the same extent as if she had survived her husband and had become his widow. Acts 1875, Regular Session, 178.

At the time she commenced this action the plaintiff occupied the same relation to the land, of which she demanded partition, that she would if she had already become the widow of her husband. If, therefore, as the widow of her husband, the plaintiff would have had no interest in the land, it follows that she had no inchoate interest to vest and become absolute at the time of the sheriff's sale.

Applying the provisions of sec. 31, *supra*, to the facts averred in the complaint, and giving those provisions what seems to us to be a fair and reasonable construction, as applicable to those facts, we think the plaintiff failed to show any title to the land, as against the defendant, and that the demurrer to the complaint was correctly sustained. *Nottingham v. Calvert*, 1 Ind. 527 ; *Fletcher v. Holmes*, 32 Ind. 497 ; *May v.*

 Rosenzweig v. Frazer.

Fletcher, 40 Ind. 575; *Huston v. Neil*, 41 Ind. 504; *McCaffrey v. Corrigan*, 49 Ind. 175.

The cross complaint did not make a case for the foreclosure of the mortgage and a resale of the land, as against the plaintiff. Its averments were not sufficient to support more than a decree limiting the time within which the plaintiff might exercise her right to redeem the land, but to that extent we think the cross complaint constituted a good cause of action against her. No question is made as to the sufficiency of time allowed her to redeem, and hence there is nothing before us upon that branch of the decree.

As the plaintiff was shown to have no title to the land, and as there was no personal judgment against her, the erroneous entry of the decree of foreclosure upon the cross complaint was, as to her, a harmless error.

Nothing has, consequently, been urged on her behalf, entitling her to a reversal of the judgment.

The judgment is affirmed, with costs.

 No. 8977.

ROSENZWEIG v. FRAZER.

PRACTICE.—*Motion for New Trial.*—It is not a good cause for a new trial, that the judgment is not sustained by the evidence, or is contrary to law.

PLEDGE.—*Sale of.*—*Demand.*—*Notice.*—*Mechanics' Lien.*—*Statute Construed.*—Upon default in the payment of a debt, an article pledged may be sold at public auction, after demand of payment, and upon notice to the pledgor of the time and place of sale. The act concerning liens of mechanics, etc., approved May 20th, 1852, R. S. 1881, section 5304, is not applicable to pledges.

SAME.—*Conversion.*—*Measure of Damages.*—If the pledgee make an unlawful sale, it constitutes a conversion; and the measure of damages is the value of the article, less the amount for which it was pledged.

From the Tippecanoe Circuit Court.

82	342
135	176
82	342
138	599
82	342
143	143
82	342
154	343
82	342
159	677
82	342
166	365

Rosenzweig v. Frazer.

C. D. Jones and *A. K. Aholtz*, for appellant.

A. L. Kumler, *G. O. Behm* and *A. O. Behm*, for appellee.

WOODS, J.—The appellant, who was the defendant below, moved for a new trial because the judgment was not sustained by sufficient evidence and was contrary to law.

These are not statutory causes for a new trial. Code of 1852, sec. 352; R. S. 1881, sec. 559. It is cause for a new trial if the verdict or finding is not sustained by the evidence or is contrary to law, but not so of the judgment. It frequently occurs that, upon verdicts or findings in strict accord with the law and the evidence, judgments contrary to both law and evidence are rendered. But, as has been often decided, the remedy against such errors must be sought through an exception to, or a motion to modify, the judgment.

In this case, the judgment conforms strictly to the finding, but that does not affect the rule of practice that a new trial can be had as a matter of right only for the causes named in the code.

We have, however, examined the evidence in the record, and find not only that the court's decision (or finding, *Wilson v. Vance*, 55 Ind. 394.) is sustained by the evidence, but that a different conclusion could not well have been reached.

The action was for the unlawful conversion by the defendant, to his own use, of a watch which the plaintiff had left with him as a pledge for the repayment of a sum of money loaned by the defendant to the plaintiff. No time was specified for the repayment of the loan, but, in the following January, the defendant had sent the plaintiff notice by letter, which the plaintiff received, that he must redeem the watch, else it would be sold. Thereupon, the plaintiff deputed an agent to effect a redemption. The agent called upon the defendant a number of times, with money sufficient for the purpose, and offered to pay the defendant even more than the amount which he had claimed to be owing him, but, upon one and another pretence, the agent was put off until the follow-

Rose v. The State.

ing October, when the defendant declared that he had sold the watch and could not restore it.

The defendant did, at his place of business, dispose of the watch in exchange for another watch and a sum of money. This was clearly an unlawful sale, and constituted the conversion charged in the complaint. It rendered unnecessary any formal demand by the plaintiff before commencing the action. There was, however, proof of such demand. For the same reason, no formal tender of the money due was necessary.

A pledge is not among the enumerated subjects, nor within the scope, of "An act concerning liens of mechanics, merchants and others," approved May 20th, 1852. 2 R. S. 1876, p. 335; R. S. 1881, sec. 5304.

The rule in reference to pledges is that, upon default in the payment of the debt, the article may be sold for the debt, but the sale must be at public auction, and can be made only after demand of payment, and upon notice to the pledgor of the time and place of sale. *Indiana, etc., R. W. Co. v. McKernan*, 24 Ind. 62, and cases cited; *Evans v. Darlington*, 5 Blackf. 320.

Having unlawfully disposed of the property, the defendant was liable to the plaintiff for its value, less the amount of his lien. *Shaw v. Ferguson*, 78 Ind. 547.

Judgment affirmed, with costs.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 10,286.

ROSE v. THE STATE.

32 344
154 649

CRIMINAL LAW.—*Assault and Battery with Intent to Murder.—Conviction.—Verdict.—Presumption.*—Upon the trial of an information charging an assault and battery with intent to murder (R. S. 1881, section 1909), a verdict: "We, the jury, find the defendant guilty, and assess his fine

Rose v. The State.

at \$275, and that he be imprisoned in the county jail three months," must be deemed a conviction of the highest offence charged.

SAME.—Presumption of Minority.—In such case the presumption of defendant's full age will be deemed met and overcome, in aid of the verdict, by the counter presumption of minority afforded by section 258, Acts 1881, p. 164 (R. S. 1881, section 1833), and by the presumptions in favor of the action of the jury, and of the court pronouncing the judgment.

VERDICT.—Intendments.—All reasonable intendments will be made in favor of a verdict.

SAME.—Judgment.—No valid judgment can be rendered upon a verdict which is radically defective.

From the Wayne Circuit Court.

H. C. Fox and *W. A. Bickle*, for appellant.

D. P. Baldwin, Attorney General, *C. E. Shively*, Prosecuting Attorney, and *H. U. Johnson*, for the State.

ELLIOTT, J.—The information upon which the appellant was tried and convicted charges him with an assault and battery with intent to murder. The verdict returned by the jury reads thus: "We, the jury, find the defendant guilty and assess his fine at \$275, and that he be imprisoned in the county jail three months." The appellant moved for a *venire de novo*, to set aside the verdict upon the ground of uncertainty, and in arrest of judgment. These motions were overruled and exceptions properly reserved.

It is undoubtedly the law that where a verdict finds a defendant guilty in a case where the indictment charges an offence involving minor ones, and does not specify the particular offence, it will be deemed a finding of guilty of the highest offence charged. *Kennedy v. State*, 6 Ind. 485; *Frolich v. State*, 11 Ind. 213.

The verdict in this case must be regarded as finding the appellant guilty of the highest offence charged in the information.

It is true that a judgment must follow the verdict. It is also true that if the verdict be radically defective no valid judgment can be rendered upon it.

A jury can not impose a punishment not warranted by

Rose v. The State.

law. *Veatch v. State*, 60 Ind. 291. The punishment prescribed in the section of the statute defining the crime of which appellant was found guilty does not provide for any such punishment as that named in the verdict. If the case is governed exclusively by the provisions of that section, and no others are to be looked to, the verdict must be held bad, for it prescribes a punishment for which the law supplies no warrant, and will not furnish support for a valid judgment.

We have a statute which provides that "When any person under the age of twenty-one years shall be convicted of any crime the punishment for which is imprisonment in the State prison, imprisonment in the county jail for any determinate period may be substituted." Acts 1881, p. 164. There is, therefore, a statute authorizing such a verdict as that rendered, provided the age of the accused can be presumed to be such as to bring the case within the statute. We are not disposed to encroach upon the rule that all persons are presumed to be of full age until the contrary appears. Fully recognizing the existence of this presumption we think it is here met and overcome by counter presumptions.

It is settled that all reasonable intendments will be made in favor of the verdict. *Lyons v. People*, 68 Ill. 271; *People v. McCarty*, 48 Cal. 557; *Schoonover v. State*, 17 Ohio St. 294, 1 Bish. Crim. Proced., section 1005. There is a statute authorizing such a punishment as that inflicted by the jury, and it seems to us that it is reasonable to presume, in the absence of anything to the contrary, that the jury did not go beyond the law, but kept within it, and assessed the punishment because they found the case to be within the statute.

We have considered one presumption which confronts that of full age. There is another. It is a rule of almost every day application, that all reasonable presumptions will be made in favor of the action of the trial court. This requires us to presume that the verdict was upheld because the court found it to be within the statute. It would be unreasonable to presume, in the face of the statute referred to, that the court

Morgan *et al.*, Executors, v. Muldoon.

pronounced judgment upon a verdict not warranted by law. As nothing appears showing that the appellant was without the statute because of age, we must hold that he was within it; otherwise we must strike down a verdict and a judgment upon a mere rebuttable presumption, and that, too, where two of equal or greater strength are arrayed against it.

We do not deem it necessary to enquire whether this case is or is not within the rule laid down in *Hoskins v. State*, 27 Ind. 470, or whether that case asserts a correct doctrine. It was there held that a verdict upon an indictment charging grand larceny, which found the accused guilty without specifying the offence, but assessing the punishment for petit larceny, was valid, for the reason that it should be regarded as finding him guilty of petit larceny, and for the further reason that the accused was not prejudiced, because the punishment was less than that prescribed by law.

Judgment affirmed.

No. 9447.

MORGAN ET AL., EXECUTORS, v. MULDOON.

83	347
154	316
154	317

COVENANT.—*Warranty Deed.*—*Paramount Title.*—*Judgment.*—*Evidence.*—*Notice.*—*Estoppel.*—*Decedent's Estate.*—In a suit against executors for breach of covenants of seizin and warranty in a deed of conveyance of lands by the testator, who was a remote grantor, alleging ouster of the plaintiff by judgment upon a paramount title, it appeared by the record thereof that suit was brought against the present plaintiff for possession; that the warrantor, on his own application verified, stating that he was the real party in interest, and bound to maintain the title to avoid damages on his covenants, became a defendant to the suit, and undertook the control of the defence; that, upon his death, the suit as to him abated, the present plaintiff was defaulted, and judgment of ouster rendered. But it was not shown that the warrantor had been formally notified of the pendency of that suit.

Held, that the record was evidence of sufficient notice or a waiver thereof,

Morgan et al., Executors, v. Muldoon.

and that the judgment concluded the executors of the warrantor, so that they could not offer evidence to show that the title of the plaintiff in the former suit was not paramount.

SAME.—*Vendor and Purchaser.*—*Covenantor and Covenantee.*—Where the covenantee in a deed is sued for possession of the real estate by one claiming under a paramount title, the covenantee may relieve himself of the burthen of defending the suit by giving notice to his covenantor of the pendency of the suit, and thereby cast upon him the duty of defending the title, and bind him by the judgment.

From the Porter Circuit Court.

J. Bradley, J. H. Bradley, A. S. Jones, M. L. DeMotte and
— *Jones*, for appellants.

F. Church and W. Johnson, for appellee.

BLACK, C.—This was an action by the appellee against the appellants, executors of the last will and testament of Lansing Morgan, deceased, upon covenants in a deed of conveyance of certain real estate in Porter county, in this State, executed by said testator.

The complaint alleged that on the 29th of December, 1869, said Lansing Morgan was in possession of said real estate and claimed to be the owner thereof, and that he and his wife on that day, by a deed which is made part of the complaint, and which contains the usual common-law covenants, for a valuable consideration mentioned, conveyed it to John Thomas and Daniel P. Ingraham, and by said deed covenanted, etc.; that on the 3d of July, 1872, said John Thomas and his wife conveyed all his right, title and interest in said premises to said Daniel P. Ingraham; that on the 14th of July, 1874, said Daniel P. Ingraham and his wife conveyed said premises in fee simple to the appellee, for a valuable consideration mentioned. The deed of Thomas and wife to Ingraham and that of Ingraham and wife to the appellee, being warranty deeds in the statutory form, are made parts of the complaint. It is alleged that under all said conveyances possession was taken by the respective grantees; that on the 11th of September, 1876, appellee was in peaceable possession, under and by vir-

Morgan et al., Executors, v. Muldoon.

tue of said conveyances; that at that date Susan Vanderpool and others named commenced an action of ejectment against the appellee in the circuit court of said county; that the plaintiffs in that action claimed said real estate by a title paramount to that of said Lansing Morgan, conveyed to appellee, and existing before and at the time of said Morgan's conveyance to said Thomas and Ingraham; that said Lansing Morgan had notice of the pendency of said action, and was, upon his own request, made a party defendant therein; that said action was finally determined in favor of the plaintiffs therein, and said court rendered judgment that they were the owners and entitled to the possession of said premises, which judgment, it is alleged, is in full force, unreversed and unappealed from. It is alleged that, by reason of said judgment, the appellee was compelled to and did vacate said premises and surrender possession thereof to the plaintiffs in said action. Breaches of the covenants of seizin and of warranty are assigned.

The appellants answered in three paragraphs. The first was a general denial; the others need not be further noticed.

The cause was tried by the court, and there was a finding for the appellee. A motion for a new trial made by the appellants was overruled, and judgment was rendered in favor of the appellee.

The overruling of the motion for a new trial is assigned as error. On the trial, the appellee introduced in evidence the three deeds set forth by the complaint, exemplifications from the office of the commissioner of the general land-office of the patents, dated March 30th, 1837, conveying the land in controversy to Robert Starkweather, the record of a deed, dated July 17th, 1843, from Robert Starkweather and wife to Isaac Vanderpool, and the record of the action of Susan Vanderpool and others against the appellee and her husband and Lansing Morgan.

The record of this action shows that, on the 11th of September, 1876, Susan Vanderpool and five others filed their

Morgan et al., Executors, v. Muldoon.

complaint against the appellee and her husband, in the circuit court of said county, the complaint alleging that Isaac Vanderpool died in 1868, seized of said land; that the plaintiffs were his widow and children and only heirs, and, as such heirs, were the owners of said land in fee simple and entitled to possession thereof; that the defendants unlawfully held possession and claimed title and had kept the plaintiffs out of possession, to their damage, etc. And the plaintiffs prayed that it be adjudged and decreed by the court that the title to said land be forever quieted in them, and that the defendants and each of them and all claiming under them be forever enjoined and restrained from asserting or setting up any right, title or interest in or to said land; and the plaintiffs demanded judgment for the recovery of the possession and for damages. Issues were formed and tried. There was a finding for the plaintiffs, and judgment was rendered giving the relief sought by the complaint. Upon application by the defendants, as shown by said record, a new trial was granted as of right, upon the payment of costs.

Afterward, Lansing Morgan filed his verified petition to be made a party, alleging, among other things, that the costs were paid by him and that a new trial had been granted; "that he is the real party in interest in said controversy," mentioning his deed and the other deeds by which the land was conveyed to the appellee; and "that this affiant is legally bound, as he is informed and believes, to maintain his said deed of general warranty, in order to protect himself against a suit for damages."

He was thereupon admitted as a defendant and filed his answer, a general denial. Afterward, he filed a petition to transfer the action to the United States Court, which was overruled. He then filed an affidavit and motion for a continuance, and the cause was continued at his costs.

On the 1st of October, 1878, his death was suggested, and on the 18th of October, 1878, it was ordered that the suit abate as to him, and the other defendants were defaulted. The

Morgan et al., Executors, v. Muldoon.

cause was then submitted to the court for trial, and the court found for the plaintiffs, that all the material allegations of the complaint were true; that Isaac Vanderpool died seized in fee simple of said land; that the plaintiffs were his sole heirs and as such were the owners and entitled to the possession of said land. The title was quieted in them, and the defendants and all persons by, through or under them or either of them, were perpetually enjoined from asserting or setting up any claim or title in or to said lands; and it was ordered that the plaintiffs have execution for possession, and that they recover their costs of the defendants.

The appellee also introduced evidence as to payments of purchase-money for said land made by her, and as to her possession and the surrender thereof; also, testimony tending to show that the money with which the costs were paid for the purpose of obtaining a new trial in the Vanderpool action was furnished by Lansing Morgan.

The appellants offered certain documentary evidence and certain testimony, for the purpose of proving title in said Lansing Morgan at the date of his conveyance of said land, and for the purpose of showing that the title of the plaintiffs in said action against the appellee was not paramount to that of said Lansing Morgan.

The court, upon objections made by the appellee, excluded this offered evidence. The rulings excluding it were assigned as causes for a new trial, and two questions pertaining to said rulings are suggested and argued by counsel:

First. Are the appellants concluded in this action by the judgment in favor of the Vanderpools?

Second. Was the evidence offered by the appellants and excluded, competent to prove title in Lansing Morgan at the date of his conveyance?

If a warrantee retire before a paramount title, he must, in such an action as this, show that it was paramount, unless that fact has been established by a judgment or decree in a suit of which the covenantor was properly notified, in which case the

Morgan *et al.*, Executors, v. Muldoon.

judgment or decree is conclusive evidence of the validity of the paramount title. It is conceded for the appellants, that where a covenantee is sued by one claiming under a paramount title, the covenantee may relieve himself of the burden of defending the suit by giving notice to his covenantor of the pendency thereof, and may thus cast upon the covenantor the duty of defending the title, and render him bound by the judgment.

It is also conceded that while Lansing Morgan was a party to the action brought by the Vanderpools, he was bound by the proceedings, and that if he had continued to be a party until the rendition of judgment, he and his personal representatives would have been concluded by the judgment. But as, by his death, he ceased to be a party, and the action as to him was abated, and as the evidence does not show any notice to Lansing Morgan aside from what may be inferred from his appearance and the record of said action, or any notice to the appellants, therefore, it is claimed, the appellants are not concluded by the judgment.

Where the covenantor has been properly notified by the covenantee of the action against the latter, and has appeared to the action, but has died before judgment, it has been held that his representatives are bound by the judgment. *Brown v. Taylor*, 13 Vt. 631. See, also, *Somers v. Schmidt*, 24 Wis. 417 (1 Am. R. 191); Rawle Cov. Title, 4th ed., 245.

In *Brown v. Taylor*, *supra*, there was a notice in writing from the covenantee to the covenantor, and the covenantee is not bound to defend further after proper notice, and a judgment by default is then conclusive. *Jackson v. Marsh*, 5 Wend. 44.

It is insisted by the appellants that, notwithstanding the appearance of Lansing Morgan to the action brought by the Vanderpools, and the part taken therein by him as shown by the record, there must be further proof of notice to him or to the appellants.

In analogy to the process called "voucher" at the ancient common law, whereby the impleaded warrantee might bring

Morgan *et al.*, Executors, v. Muldoon.

in his warrantor as the real party, and thus make him defend the action, so the object of notice is to make the covenantor either actually or constructively a party, in order that there may be an application of the rule, that the judgment of a court of competent jurisdiction can not be inquired into collaterally, which rule applies only to those who are said to be parties or privies to the action. *Sisk v. Woodruff*, 15 Ill. 15; *Rawle Cov. Title*, 12,231.

The fact of the reception of the notice seems to be within the province of the jury, "except in the single case where the party bound by the covenant is made a party to or has placed himself upon the record of the adverse suit." *Rawle Cov. Title*, 224. As the covenantor will not be concluded by the judgment unless actually or constructively a party, it might be expected that where covenantors have become actual parties, it will generally be found that they had been notified by the covenantee; and it might not be unreasonable, where a covenantor has made himself a party and has made admissions of record, to infer notice, nothing to the contrary appearing, as otherwise his action would be a voluntary assumption of responsibility. In *Mason v. Kellogg*, 38 Mich. 132, GRAVES, J., expresses the opinion that appearing and assuming the defence, without protesting want of due notice, is a waiver of formal notice, and subjects the covenantor to the same extent as if he had been formally notified. The covenantee is not bound, after the covenantor has been brought into the action, to see that he remain in till judgment, but may in good faith at once abandon the conduct of the defence.

In the case at bar, if notice was given, such as would have been required to bind the covenantor if he should not become a party to the action, the person to whom it was given is dead, and the person from whom it must have proceeded is prevented by the statute from testifying.

Where the covenantor has paid costs and made admissions of record upon his oath, has appeared, taken upon himself the

Morgan et al., Executors, v. Muldoon.

defence and pleaded by attorney, and has obtained a continuance, as in this case, it may be presumed that he was properly notified, or it may be said that for himself and for his estate he waived notice. The purpose of formal notice was accomplished.

It was as if there had been notice; and notice being once given, the covenantee, acting in good faith, was not bound thereafter to defend, and want of notice could not afterward be properly urged in behalf of the covenantor or of his personal representatives.

The judgment in the action brought by Susan Vanderpool and others against the appellee being conclusive against the appellants, it is not necessary for us to enquire concerning the evidence offered by the appellants to prove title in Lansing Morgan. The court did not err in excluding this evidence.

The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the costs of the appellants.

ON PETITION FOR A REHEARING.

BLACK, C.—It is argued by the learned counsel for appellants that the notice to the warrantor of the pendency of the action against the warrantee should be in writing, and that, in the action on the covenant, a written notice must be proved where the warrantor was not an actual party to the judgment rendered in the prior action.

Where the warrantor has done what was done by Lansing Morgan in the action against the appellee, his remote warrantee, it seems immaterial whether he was induced by a written notice or by an oral one, and unnecessary to prove how his proceedings were brought about.

It was not necessary for us to decide whether or not a warrantor may ignore a notice when it is not in writing.

While it is admitted that the record of the action against the appellee was competent evidence for the purpose of show-

Tate et al. v. Means et al.

ing that there was a judgment in ejectment against her, it is claimed that such record could be used for no other purpose; that as Lansing Morgan died, and the suit abated as to him, and no judgment was rendered against him, therefore the record of the proceedings in that action can not be used as evidence against his representatives to show the part taken by him in those proceedings, for the purpose of inferring notice to him or waiver of notice by him. It is insisted that after the death of Lansing Morgan, and the abatement of the suit as to him, the record should be regarded as if he had never filed a petition and answer, and as if he had not appeared.

Lansing Morgan was not, in fact, a party when the judgment was rendered. Proof of proper notice to him would make him constructively a party to the judgment. The record might be used as evidence for the purpose of showing notice to him, though he was not an actual party to the judgment, and thus a record, considered as a memorial of proceedings that transpired in a court of justice, in which respect it is conclusive against strangers, would establish the conclusiveness of the judgment as *res judicata*. Bigelow Estop. 3-4; Freeman Judgments, section 416.

We find ourselves unable to reach a conclusion different from that expressed in our original opinion.

PER CURIAM.—The petition for a rehearing is overruled.

No. 9373.

TATE ET AL. v. MEANS ET AL.

SUPREME COURT.—*Practice.—New Trial.—Weight of Evidence.*—Where it appears that evidence was introduced on the trial tending to sustain the verdict on every material point, the Supreme Court will not reverse the judgment on the mere weight of the evidence.

From the Henry Circuit Court.

Tate et al. v. Means et al.

J. Brown, for appellants.

J. H. Mellett and *E. H. Bundy*, for appellees.

HowK, J.—This was a suit by the appellees against the appellants to set aside the last will and testament of one Reuben Means, deceased, and the probate thereof upon the ground, as alleged, that the said Means was, at the time of the execution of said will, of unsound mind. The cause was put at issue and tried by a jury, and a verdict was returned for the appellees, and over the appellants' motion for a new trial the court rendered judgment in favor of the appellees, as prayed for in their complaint.

The overruling of their motion for a new trial is the only error assigned by the appellants.

This court is asked by the appellants' learned counsel, in his elaborate brief of this cause, to reverse the judgment below on the weight of the evidence, and on no other ground. It is not the province of this court, however, to weigh the evidence, or to attempt to determine the matter in controversy by what we might consider the preponderance of the evidence, as the same appears in the record. Where it appears, as it does in this case, that there was evidence introduced on the trial, tending to sustain the verdict on every material point, this court will not reverse the judgment on the mere weight of the evidence. This rule, and the reasons for it, have been so often stated in the reported decisions of this court, that it seems hardly necessary to cite the authorities in support of such rule, or to repeat the reasons therefor. *Cox v. State*, 49 Ind. 568; *Swales v. Southard*, 64 Ind. 557; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73.

We have found no error in the record of this cause which would authorize the reversal of the judgment below.

The judgment is affirmed, with costs.

The Louisville, New Albany and Chicago Railway Company v. Kious.

No. 9799.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. KIOUS.

CONTINUANCE.—*Witness.—Diligence.—Practice.*—Where an affidavit for a continuance, on account of an absent witness, shows that the applicant knew that the attendance of the witness could not be secured, but took no steps to secure his deposition, the application should be refused, for failure to show due diligence.

SAME.—*Deposition of Witness.*—Where a party can obtain the deposition of a witness whose personal attendance he knows can not be secured at the term of court at which the cause is set for trial, it is his duty to cause his deposition to be taken.

RAILROAD.—*Killing Stock.—Venue.—Evidence.*—In an action, under the statute, against a railroad company for killing stock, the plaintiff must allege and prove the county in which the stock was killed; but it is not necessary that the proof be made by direct or positive testimony; it will be sufficient if facts are proved from which it can be reasonably inferred.

SAME.—*Complaint.—Duty to Fence.*—In such action it is not necessary to allege in the complaint that the company was bound to fence the railroad at the place where the stock was killed. If not obliged to fence where the injury occurred, it may be shown as matter of defence.

From the Carroll Circuit Court.

A. W. Reynolds and E. W. Sellers, for appellant.

J. Applegate and — Palmer, for appellee.

ELLIOTT, J.—Appellee brought this action to recover for cattle killed and injured by a locomotive of the appellant at a point on the line of its railroad not securely fenced.

The appellant contends that the court erred in refusing a continuance. We have examined the affidavit filed in support of the application, and are of the opinion that it does not show diligence. It does show that at the time the cause was called for trial, the witness could not be present, but it also shows that this was almost certain to be the case, and that appellant knew it. It appears, therefore, that the appellant, having knowledge that the attendance of the witness could not be secured, took no steps to secure his deposition, and in this was guilty of negligence. Where a party can obtain the

Brinkman *et al.* v. Ritzinger, Adm'x.

deposition of a witness whose personal attendance he knows can not be secured at the term of court at which the cause is set for trial, it is his duty to cause his deposition to be taken.

It is true that, in such an action as the present, the plaintiff must allege and prove the county in which the cattle were killed. *Evansville, etc., R. R. Co. v. Epperson*, 59 Ind. 438; *Louisville, etc., R. W. Co. v. Breckenridge*, 64 Ind. 114. It is not necessary, however, that this should be done by direct or positive testimony. It will be sufficient if facts are proved from which it can be reasonably inferred. There are many facts justifying the inference that the cattle were killed in the county of White, as charged in the complaint.

In discussing the ruling on the motion in arrest of judgment, counsel say that the complaint is bad because it does not allege that the company was bound to fence at the place where the cattle were killed. This position is opposed by many cases. *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107; *Ft. Wayne, etc., R. R. Co. v. Mussetter*, 48 Ind. 286; *Ohio, etc., R. W. Co. v. McClure*, 47 Ind. 317. It may be shown as matter of defence that the railroad company was not obliged to keep the road fenced at the point where the injury occurred.

Judgment affirmed.

Petition for a rehearing overruled.

No. 8844.

BRINKMAN ET AL. v. RITZINGER, ADM'X.

RECEIVER.—*Appointment.—Practice.*—A receiver may be appointed, if the facts justify it, at any time while a suit is pending, and after appeal to the Supreme Court from a final judgment, the suit is still pending, so that the lower court may, on application, make such appointment.

SAME.—*Mortgage.—Rents.—Taxes.*—There was a foreclosure of a mortgage on lands for interest due, the principal debt not having matured, and an appeal to the Supreme Court by the administratrix without bond (the mortgagor having died). Pending this appeal the mortgagee applied to

Brinkman *et al.* v. Ritzinger, Adm'x.

the lower court for a receiver of the mortgaged premises, showing the foregoing facts, and that the mortgagor died insolvent, having no other property; that the land was worth less than the mortgage debt, and the annual rents less than the interest; that the heir was appropriating the rents to her own use, and not paying the taxes, and that a portion had been sold for delinquent taxes, and that there was a further delinquency of taxes in the sum of \$520.

Held, that the case was a proper one for the appointment of a receiver, to take the rents pending the appeal, and apply them as the court should direct.

From the Marion Superior Court.

S. Claypool, H. C. Newcomb and W. A. Ketcham, for appellants.

J. T. Dye, for appellee.

BICKNELL, C. C.—The appellee had a judgment of foreclosure against the appellant Dorothea Brinkman, and her husband, Charles Brinkman, upon a mortgage of land made by them, embracing the land only, and not the rents and profits, and not to be due until 1887. The foreclosure was for two instalments of interest; there was no application for a receiver prior to the judgment, and there was no personal judgment on the notes secured by the mortgage, and no claim was made in the suit upon the rents and profits of the land.

After the judgment Charles Brinkman died, his widow Dorothea became his administratrix and appealed from the judgment to this court, without an appeal bond.

The appellee then brought this suit against Dorothea Brinkman individually, and Dorothea Brinkman as administratrix, alleging the recovery of the judgment and the appeal without bond, and that the sums found due by the judgment were first liens on the land; that the administratrix is sole heir at law of her husband; that he died insolvent; that the land is not worth the amount of the mortgage; that the annual rents and profits will not equal the annual interest secured by the mortgage, and that there is no property except the land out of which any part of the mortgage debt can be made; that the plaintiff's proceedings are delayed by the ap-

Brinkman et al. v. Ritzinger, Adm'x.

peal; that the defendant is appropriating to her own use the rents and profits of the land, and is allowing the interest on the mortgage debt to accumulate. The complaint prayed for a receiver to take charge of the land and collect the rents and profits and hold them until the determination of the appeal, or apply them under the order of the court to the payment of the plaintiff's debt.

An amendment of the complaint alleged that the defendant has taken possession of the land, and has been receiving and appropriating the rents and profits, claiming the same as heir at law of her deceased husband; that the land has become delinquent for taxes, and some of it has been sold for taxes and has not been redeemed, and that, unless a receiver shall be appointed, the plaintiff will not only lose the rents and profits, but will be obliged to redeem the property, and will be likely to lose her whole debt. The amendment prays that said rents and profits may be subjected to the payment of said taxes and interest, and that a receiver may be appointed to collect the rents and profits and apply them under the order of the court.

The defendant, individually and as administratrix, filed separate demurrers to the complaint as amended, for want of facts sufficient, etc. The demurrers were overruled. The defendant, individually and as administratrix, answered the complaint as amended, by general denials. By agreement a written statement of facts was taken as the evidence in the cause.

That statement contained the facts hereinbefore stated and also that Charles Brinkman died in the occupation of two of the mortgaged tracts as his homestead, leaving no personal property of which said mortgage debt could be made, and that the defendant, since his death, has been occupying said homestead, and has been receiving the rents of the other mortgaged property; that lots ten and eleven on square forty have been sold for taxes, and that the other real estate is delinquent for taxes in the sum of \$520.30; that the defendant claims the foreclosure judgment was too large, and, therefore,

Brinkman et al. v. Ritzinger, Adm'x.

is prosecuting her appeal. Upon the trial the court found for the plaintiff, and that a receiver should be appointed to collect the rents and profits of the premises pending the said appeal, and until the further order of the court, and to hold and apply the same under the order of the court, and it was decreed accordingly. The defendant, in her own right and as administratrix, moved to modify the decree so as to confine its operation to so much only of the property as was not held by her as a homestead, as heir of her deceased husband. This motion was overruled by the court.

The defendant, in her own right and as administratrix, made separate motions for a new trial, which motions were overruled; the reasons for the new trial were that the finding and judgment were contrary to law, contrary to the evidence and not sustained by the evidence, and that the court erred in refusing to modify the judgment. This last reason is not proper for a new trial, but the objection sought to be raised thereby is properly saved afterwards, in the bill of exceptions.

The defendant appealed from the judgment to the superior court of Marion county in general term, and there assigned errors as follows:

"1. Overruling the demurrer of the defendant to the complaint as amended.

"2. Overruling the demurrer of the defendant as administratrix to the complaint as amended.

"3. Overruling the defendant's motion to modify the judgment.

"4. Overruling the defendant's motion for a new trial.

"5. Overruling the motion of the defendant as administratrix for a new trial."

After said errors were assigned, the plaintiff made an affidavit in the superior court at special term, that it was necessary to the rights of the parties that an appeal bond should be executed upon said appeal to said court in general term, and that, without such appeal bond, said rents and profits would be lost to the plaintiff. Thereupon, without any no-

Brinkman *et al.* v. Ritzinger, Adm'r.

tice to defendant, the superior court in special term made the following order: "It is therefore ordered that the receiver shall have full power to proceed and collect the rents under the order of this court herein, unless the appellant shall, within ten days, file an appeal bond as provided by law."

The defendant moved to set aside this order, because it was without notice, and because of alleged insufficiency in the affidavit; this motion was overruled, the defendant excepted and again appealed to the court in general term. The defendant then executed an appeal bond pursuant to said order.

The superior court in general term affirmed the judgment of the court in special term, and the defendant appealed to this court. The error assigned here by the appellant is that the court in general term erred in affirming the judgment of the court in special term.

In the absence of any statute, the appointment of a receiver depends upon the sound discretion of the court. *Verplank v. Caines*, 1 Johns. Ch. 57. And the fact which governs that discretion is the jeopardy of the fund. *Orphan Asylum v. McCartee*, Hopkins Ch. 429.

A receiver is a person appointed by the court to receive the rents and profits of land, or any other property, in controversy in a suit, and capable of reduction into possession, where either party ought not to have control thereof pending the suit.

Ordinarily, under the old chancery practice, the appointment of a receiver was an interlocutory proceeding in a pending suit, and it was held that the court had no authority to appoint a receiver, unless there was a suit pending. *Anon*, 1 Atkyns, 489. Except in cases of idiots and lunatics. *Ex parte Whitfield*, 2 Atk. 315. Our statute on receivers, Civil Code, sec. 199, as amended by the act of March 12th, 1875, Acts 1875, p. 117, makes no substantial change in the powers of the court, or in the office of the receiver.

Under this statute it has been held that an application for a receiver is an interlocutory proceeding in a pending suit. Thus, in *Wood v. Brewer*, 9 Ind. 86, this court said, in refer-

Brinkman *et al.* v. Ritzinger, Adm'x.

ence to orders appointing receivers: "They are interlocutory orders, and the statute on the subject of appeal from such orders, does not embrace orders relative to receivers."

The act of March 12th, 1875, *supra*, gives an appeal in such cases, and re-enacts the old rule, to wit: That a receiver can not be appointed until after answer or reasonable notice of the pendency of the action, and of the application for such appointment; but under this act such application is still regarded as an interlocutory proceeding. Therefore, in *Dale v. Kent*, 58 Ind. 584, where a receiver had been appointed upon a complaint to dissolve partnership, and afterwards the suit was dismissed, and then the plaintiffs had another receiver appointed, this court reversed the case and said, referring to the act of March 12th, 1875, *supra*: "By the first section of the act it is clear, that a receiver can not be appointed, except it be in an action *pending*." But there the action was not pending, but had been dismissed.

A receiver may be appointed before the hearing, if the complaint contain a prayer therefor. *Cooke v. Gwyn*, 3 Atkins, 689. And he may be appointed after the decree, while the decree remains in force, whether such relief was prayed for in the complaint or not. *Cooke v. Gwyn*, 3 Atkins, 689; *Lube's Eq. Pl.* 101; *Meredith v. Wise*, 1 Molloy, 27; *Connelly v. Dickson*, 76 Ind. 440.

The application for a receiver is generally made by motion after answer filed, but it may be made on affidavits before answer, if it be shown that the plaintiff has an equitable claim upon the property, and that a receiver is necessary to preserve it from loss. *Metcalf v. Pulvertoft*, 1 Ves. & B. 180; *Duckworth v. Trafford*, 18 Vesey, 283; *Vann v. Barnett*, 2 Bro. C. C. 158; *Bloodgood v. Clark*, 4 Paige, 574.

In the foreclosure suit hereinbefore referred to, there was no prayer for a receiver, but if the complaint in that suit had contained such a prayer, with averments that the premises were not sufficient in value to pay the debt, and that the mortgagor, or party in possession, was insolvent, undoubtedly

Brinkman *et al.* v. Ritzinger, Adm'r.

a receiver would have been appointed before the hearing. *Sea Ins. Co. v. Stebbins*, 8 Paige, 565; *Bank of Ogdensburgh v. Arnold*, 5 Paige, 38; and see also *Frelinghuysen v. Colden*, 4 Paige, 204, and *McCaslin v. State, ex rel.*, 44 Ind. 151.

That suit, having been appealed to the Supreme Court, may be regarded as yet pending for the purpose of an application for a receiver of the rents and profits, and we think the court that rendered the decree appealed from was the proper court to hear and determine such an application; whether the application be made by motion or petition, or in the form of a complaint, is, under our practice, immaterial in such a case.

The averments of the complaint as amended were sufficient to authorize the appointment of a receiver after decree. All the rights of the appellant, whether as co-mortgagor, or as administratrix, or as heir of her husband, were subordinate to the rights of the mortgagee against the appellant under the mortgage. There was no error in overruling the demurrers to the complaint as amended, or the motion to modify the judgment, or the motions for a new trial, and there was no error in the judgment of the superior court in general term affirming the judgment of the court in special term.

No error was assigned in the superior court in general term upon the action of the court in special term in refusing to grant the appellants' motion to set aside the order authorizing the receiver to act, notwithstanding the appeal herein, unless an appeal bond should be filed in ten days. No question is presented thereupon in this court. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby in all things affirmed, at the costs of the appellants.

ELLIOTT, J., did not participate in the decision of this cause.

Westerfield v. Kimmer *et al.*

No. 8872.

WESTERFIELD v. KIMMER ET AL.

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MARRIED WOMAN.—*Inchoate Interest in Husband's Real Estate.—Judicial Sale.*

—The inchoate interest of a married woman in her husband's land does not become vested by judicial sale thereof upon a judgment rendered prior to August 14th, 1875, R. S. 1881, sections 2508-9.

SAME.—*Husband and Wife.—Trust and Trustee.—Personal Property of Wife.—Resulting Trust.*—Prior to July 24th, 1853, the personal property of the wife belonged to the husband absolutely, and an agreement by him to invest it in real estate for her was without consideration and void, and real estate so purchased by him, the title to which was taken in his own name, would not be subject to a resulting trust in her favor.

SHERIFF'S SALE.—*Redemption.—Mortgage.*—A purchaser of lands at sheriff's sale, taking a deed thereof, who afterwards takes an assignment of a certificate of sheriff's sale made to satisfy a prior mortgage, must be deemed only to have redeemed, and he holds title by virtue of his own purchase, and not by virtue of such redemption.

SAME.—*Trust.—Notice.—Possession.*—Where lands are purchased at sheriff's sale, the proper title being in the husband defendant, a resulting trust in favor of the wife, of which the purchaser had no notice, can not be enforced against the latter, and her mere residence on the land, with her husband, would not be such possession as would charge him with notice.

TRUST AND TRUSTEE.—*Agreement.*—A resulting trust under section 2976, R. S. 1881, must arise when the trustee takes title, and can not be created by subsequent agreement, or by a subsequent use of the funds of the *cestui que trust* in satisfying unpaid instalments of purchase-money.

From the Grant Circuit Court.

J. F. McDowell, G. L. McDowell, J. A. Kersey and H. D. Thompson, for appellant.

J. R. Wilson and H. Brownlee, for appellees.

NIBLACK, J.—Elizabeth Westerfield, the plaintiff in this case, complained that she was the wife of William D. Westerfield, and that she and her said husband were in the possession of, and residing upon, the northwest quarter of section 35, in township 23 north, of range 6 east, in Grant county; that she was the equitable owner of the undivided five-ninths of said tract of land; that the defendant Samuel J. Kimmer claimed to have become the purchaser of the entire tract

Westerfield v. Kimmer et al.

at a sheriff's sale, at which it was sold as the property of the said William D. Westerfield, and had caused a writ of possession to be issued and placed in the hands of Benjamin R. Norman, as the sheriff of Grant county, who, by virtue of said writ, was threatening to put her and her said husband out of the possession of said land.

Prayer for an injunction and partition.

Trial by the court; finding for the defendants; motion for a new trial overruled, and judgment on the finding.

The reasons assigned for a reversal of the judgment are, that the finding was not sustained by sufficient evidence, and was contrary to the law arising upon the facts established at the trial.

It was made to appear by the evidence, that the plaintiff and the said William D. Westerfield were married in the year 1839; that prior to the year 1853 the husband, William D. Westerfield, had purchased either the entire title to, or some undivided interests in, an eighty-one acre tract of land in Fayette county, for the whole of which he had ultimately to pay the aggregate sum of about \$1,400; that on the 6th day of January, 1853, the plaintiff received from her father's estate, and as one of the legatees under his will, the sum of \$500, which she, within the next two weeks, turned over to her said husband, with an understanding and agreement with him that said money was to be invested by him in real estate for her benefit; that the money was afterwards used by her said husband in paying for the tract of land so purchased by him, and on which they then resided, with the further understanding and agreement that the plaintiff was to have an interest in the land in proportion to the amount of money so furnished by her; that in July, 1864, the said William D. Westerfield purchased the land in controversy of one Kirkpatrick for the sum of \$4,000, payable in instalments, and received a conveyance in his own name; that some months afterwards, that is, towards the close of the year 1864, he and the plaintiff sold the Fayette county land to one Weaver for the like sum of \$4,000,

Westerfield v. Kimmer et al.

payable also in instalments, with the understanding and agreement between them that the plaintiff was to have the same proportionate interest in the land in Grant county that she had held in said Fayette county land; that thereupon the plaintiff and her husband went into possession of the Grant county land, and have ever since continued in the possession of the same; that the proceeds of the Fayette county land were substantially used in paying for the Grant county land; that on the 23d day of December, 1869, the said William D. Westerfield executed a mortgage on the land in suit to one Jacob W. Spencer, to secure the payment of a promissory note for \$1,000; that in 1872 a judgment was rendered in the court of common pleas of Fayette county, in favor of the First National Bank of Cambridge City, and against the said William D. Westerfield as principal, and Samuel J. Kimmer, above named, as surety, for the sum of \$643.80, a transcript of which judgment was afterwards, in September, 1872, duly filed and recorded in the office of the clerk of the common pleas court of Grant county; that in April, 1876, an execution was issued on that judgment directed to the sheriff of said county of Grant, who levied the same on the land described in the complaint in this case, and sold the same at sheriff's sale on the 26th day of August, 1876, to the said First National Bank of Cambridge City, executing to said bank a certificate of purchase for said land; that, on the 10th day of January, 1877, said bank assigned and transferred said certificate of purchase to the said Kimmer, who in due time received a sheriff's deed for the land in his own name, and who, at the September term, 1879, of the Grant Circuit Court, recovered a judgment against the said William D. Westerfield for the possession of said land on which a writ of possession had issued, and was then in the hands of Norman, as sheriff of said county of Grant; that at the time Kimmer purchased the sheriff's certificate of sale, issued to the bank, he had no knowledge of any claim of the plaintiff to the land described in it, and never heard of any such claim previous to the 5th day of March, 1880; that in

Westerfield v. Kimmer & al.

1876 the mortgage executed to Spencer in 1869 was, by a decree of the Grant Circuit Court, foreclosed against the said William D. Westerfield; that in January, 1879, the land described in the mortgage was sold by the proper sheriff upon the decree of foreclosure, to the plaintiff in that decree; that in January, 1880, before the time for redemption had expired, Kimmer redeemed the land from that sale by purchasing in, and taking an assignment of, the decree of foreclosure upon which the sale was made.

Upon these facts it is most earnestly contended that Mrs. Westerfield has become absolutely entitled to one undivided third part of the land mentioned in her complaint, as the wife of the said William D. Westerfield, under the act of March 11th, 1875, concerning the inchoate interests of married women in the lands of their husbands, and is also the equitable owner of one-third of the remaining two undivided third parts of said land as against Kimmer as well as her husband.

By the express terms of the act of 1875, to which reference is made, its provisions are only applicable to sales made on judgments which have been rendered since it went into effect. Section 2, Acts 1875, p. 179.

Kimmer's claim to title in this case rests upon the sheriff's sale made on the judgment rendered in favor of the bank in 1872, before that act was passed, and not on the decree of foreclosure entered in 1876. Hence, Mrs. Westerfield's interest remains an inchoate, and not an absolute, interest.

Under the circumstances, Kimmer's purchase of the decree of foreclosure operated as a cancellation, and not as an assignment, of the sheriff's certificate of purchase issued upon it, and for that reason Kimmer acquired no title under the sheriff's sale upon that decree.

We are, also, unable to see any ground upon which Mrs. Westerfield can base a claim to a resulting trust in the land in dispute. By the law in force in this State at the time she received money from her father's estate, that money instantly became the property of her husband, and hence constituted

Westerfield v. Kimmer *et al.*

no consideration for the alleged promise on the part of the husband, to invest it for her benefit.

The common-law rule, which gave to the husband absolutely the personal estate of the wife, continued in force in this State until the 24th day of July, 1853, when an act of the Legislature of that year, establishing a different rule, went into effect. *Buchanan v. Lee*, 69 Ind. 117; *Miller v. Blackburn*, 14 Ind. 62; *Holland v. Moody*, 12 Ind. 170.

No trust, therefore, resulted to Mrs. Westerfield in the Fayette county land, and, as a consequence, she acquired no separate interest in the Grant county land, having had no share in the money which went to pay for it.

To establish a resulting trust by oral testimony, in opposition to the face of a deed, the evidence must be clear and explicit. Facts must also be shown from which a trust resulted at the time the deed was made and the legal title vested in the grantee. *Perry Trusts*, section 133; *Fausler v. Jones*, 7 Ind. 277; *Turner v. First National Bank of Madison*, 78 Ind. 19.

The evidence in this case fairly tended to show that William D. Westerfield had purchased the Fayette county land before he received the money which came to his wife from her father's estate, and before he had any agreement with her as to the manner in which that money was to be invested. Consequently, no trust could have resulted in favor of the wife at the time he purchased that land.

The evidence failed to show notice, either actual or constructive, to Kimmer of Mrs. Westerfield's claim at the time he purchased the land sued for. That constituted a fatal objection to her right to recover. *Milner v. Hyland*, 77 Ind. 458. Her residence on the land with her husband did not amount to such a possession on her part as constituted notice of a separate and distinct claim to any portion of it. Her possession was, under the circumstances, simply and only the possession of her husband. 2 Bishop Married Women, section 135.

The judgment is affirmed, with costs.

Proctor v. Baldwin.

No. 9155.

PROCTOR v. BALDWIN.

PROMISSORY NOTE.—*Commercial Paper.*—*Endorser and Endorsee.*—*Attorney's Fees.*—*Set-Off.*—A promissory note, payable at a bank in this State, is commercial paper, though it contain an agreement to pay attorney's fees; and set-off against the payee can not be pleaded by the maker to a suit upon it, by an endorsee without notice, for value and before maturity.

SAME.—*Collateral Security.*—*Bank Director.*—*Endorsement.*—*Consideration.*—*Notice.*—*Injunction.*—*Bona Fide Purchaser.*—Suit against the maker by a second *bona fide* endorsee of commercial paper, taken before maturity, who paid part of the price of the paper in cash, and for the balance agreed to cancel a debt held by him against his immediate endorser, which was never formally done. The payee had delivered the note without endorsement, as collateral security, to a bank for a small loan; then he endorsed it to another, who took it in good faith, agreeing to pay this loan, after which the paper was returned to its place in the bank; and afterwards he endorsed it, without the bank's consent, to the plaintiff, who, though a director of the bank, had no knowledge that the bank had any right to the paper. After the first endorsement, but without knowledge of it, the maker purchased a large note against the payee (who was and continued to be insolvent), upon which he at once began suit, getting a temporary injunction against negotiating the note of the defendant, pending which and with knowledge of it, the first endorsee made the endorsement and sale to the plaintiff, who knew nothing of the injunction. After this, the maker's suit against the payee proceeded to judgment and a perpetual injunction.

Held, that the first endorsee was protected against defences, and that the plaintiff could recover the full amount of the paper sued for.

PRESUMPTION.—A bank director is presumed to have knowledge of the securities of the bank, but this presumption may be overcome by proof. *Seem*, that if one, in consideration of the endorsement of commercial paper before maturity, agree to satisfy a note held by him against his endorser, he is entitled to protection as a *bona fide* purchaser, though he had not, in fact, cancelled or delivered up the note of his endorser.

From the Elkhart Circuit Court.

J. M. Vanfleet and *E. C. Bickel*, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellee.

MORRIS, C.—This suit was brought by the appellee against the appellant upon the following note:

Proctor v. Baldwin.

"\$1,000.

GOSHEN, IND., Jan. 31st, 1880.

"Sixty days after date I promise to pay to the order of Henderson Cole one thousand dollars, payable at the St. Joseph Valley Bank, Elkhart, Indiana, for value received, without any relief whatever from valuation or appraisement laws, with ten per cent. interest from after due, and attorney fees.

"WM. PROCTOR."

The complaint states that the payee sold and transferred the note, by endorsement, to one Myron E. Cole, before due, and that said Myron E. Cole, for value, endorsed the same, before maturity, to the appellee; that the note is due and unpaid. Copies of the note and endorsements are filed with the complaint.

The appellant answered the complaint in two paragraphs. The first states that the payee of the note had deposited the same with the First National Bank of Elkhart, Indiana, as collateral security for a loan of \$50, and that he afterwards, on the 23d of February, 1880, sold the note to one Myron E. Cole, who was at the time a clerk in said bank; that said Henderson Cole at the time specially endorsed said note to the said M. E. Cole, who agreed to pay the \$50 for which the bank held it as security, though it was not then due; that this was done clandestinely, without the knowledge or consent of the bank; that after the note had been endorsed M. E. Cole returned it to its proper place in the vaults of the bank, where it remained. It is further stated that on the 25th day of February, 1880, the appellant purchased a note executed by the said Henderson Cole, not knowing at the time that he had transferred the note sued on; that said Henderson was then, and for ten years last past had been, and is still, hopelessly insolvent and worthless; that the appellant at once commenced a suit in the Elkhart Circuit Court against the said Henderson Cole on the note so purchased by him, and in said suit procured a temporary injunction prohibiting him from disposing of the note sued on until the further order of the court; that said M. E. Cole, after he and said bank

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had notice of said injunction against the said Henderson Cole, took the note in suit from the bank and sold for its face and by endorsement transferred it to the appellee; that this was done without the knowledge or consent of the bank of which the appellee was at the time a director; that the appellee at the time he purchased said note had no actual knowledge of said injunction, nor of the fact that said note had been pledged to said bank; that on the 26th day of February, 1880, the appellee paid said M. E. Cole for said note \$600, and agreed to cancel certain notes and indebtedness held by him against the said M. E. Cole, equal to the balance of said note purchased by him from said Cole; that on the same day the appellee was notified of said injunction, and was also notified by appellant not to pay anything further on said note to said M. E. Cole, which he has not done. It is also averred that the appellant afterwards obtained judgment against the said Henderson Cole, in the suit commenced against him, for \$4,135, and a decree declaring said injunction perpetual; that on the 22d day of April, 1880, the appellant tendered the appellee \$603.50, in gold coin of the United States, being the amount of the money paid by him to the said M. E. Cole on and for said note, and the interest accrued thereon, which sum the pleader brings into court for the appellee; that the appellee refused to accept the sum so tendered.

The second paragraph states that Henderson Cole is indebted to the appellant in a sum exceeding the amount due on the note in suit, and offering to set off the same.

A demurrer was filed by the appellee to each paragraph of the answer, and sustained by the court. The appellant elected to stand by his answer, and final judgment was rendered for the appellee.

The ruling of the court upon the demurrers is assigned as error.

The first question presented for decision upon the demurrer to the first paragraph of the answer is, what title, if any, did Myron E. Cole acquire to the note sued on by the sale and

Proctor v. Baldwin.

endorsement of the same to him by Henderson Cole, the payee? The endorsement is in these words: "Feb'y 23d, 1880. Pay M. E. Cole or order." Signed "Henderson Cole."

The note is payable to the order of Henderson Cole, at a bank within this State. The delivery of it to the First National Bank of Elkhart, without endorsement, as collateral security for \$50 loaned by the bank to Henderson Cole, did not pass to the bank the legal title to the note. The title remained in Henderson Cole. *Farwell v. Tyler*, 5 Iowa, 535; *Allen v. Newberry*, 8 Iowa, 65; 2 Parsons Notes and Bills, p. 438. Though the bank had possession of, and was entitled to hold, the note as security for the payment of the \$50, yet Henderson Cole was still the legal owner of the note, and could, subject to the rights of the bank, transfer, by endorsement, the legal title and his interest in the note to M. E. Cole or any one else. In doing this, he would do no wrong to the bank. Nor would the fact that M. E. Cole was the clerk of the bank incapacitate him from accepting by endorsement the title and interest of Henderson Cole in and to the note. The transfer of the note by Henderson Cole to M. E. Cole, coupled with the agreement on the part of the latter to pay the bank, amounted to a transfer of the note subject to the rights of the bank. There was nothing wrong or unusual in this. Henderson Cole had the right so to sell and transfer, and M. E. Cole had the right so to purchase the note; and the possession of the note for this purpose was not in violation of, but altogether consistent with, the rights of the bank.

It is alleged in the answer, that the note was taken from the bank, and that the assignment was made to M. E. Cole, without the knowledge or consent of the bank, but it is also averred that, as soon as made, the note, with the endorsement upon it, was returned to the vaults of the bank. This latter statement, in connection with the agreement of M. E. Cole to pay the \$50 to the bank, frees the transaction from even a suspicion of fraud or unfairness. The note being thus in the vaults of the bank, with the endorsement to M. E. Cole upon it,

Proctor v. Baldwin.

the officers of the bank, if chargeable with a knowledge of its affairs and the condition of its securities, must be presumed to have known of the transfer of the note to its clerk, and to have assented to it. The officers of a bank are affected with notice of its condition and transactions as well as of its rights and the action of its board of directors. *Morse Banks*, 115; *Lyman v. Bank of United States*, 12 How. 225; *Gillet v. Phillips*, 13 N. Y. 114. We think that, in view of the facts stated in this paragraph of the answer, it is fair to presume that the bank was informed of the agreement of M. E. Cole to pay to it the \$50, and that it accepted or agreed to accept him as its debtor for the \$50. It is not averred that M. E. Cole did not pay the bank said \$50, as he had agreed, nor that the bank in any way objected to his disposition of the note in controversy. Had M. E. Cole taken the note from the possession of the bank without paying the \$50, and sold and transferred it to the appellee without authority to do so, he would have been guilty of a gross violation of duty, if not a crime. It will not be presumed that he was thus guilty, but rather, that, in accordance with his promise and his duty, he paid the bank the \$50. This presumption, in view of the whole transaction as set forth in the first paragraph of the answer, is eminently just. The payment of the money by M. E. Cole to the bank would have been alike in discharge of his agreement with Henderson Cole, and his duty to the bank, and quite in accordance with the nature of the transaction as indicated by the facts pleaded, and in support of the honesty and integrity of the conduct of the parties. It will not be assumed, in the absence of averment to the contrary, that he failed to pay the \$50. "When," says Wharton, "a duty is undertaken, and time requisite for the performance of the duty has elapsed, and there is no proof of the non-performance," the performance may be presumed. And this presumption is not limited to public officers. Wharton Ev., sec. 1318.

The question was, under the circumstances, one between the bank and Myron E. Cole, in which Henderson Cole had,

Proctor v. Baldwin.*

so far as the note was concerned, no interest; his right to the note was gone.

We conclude that M. E. Cole became the holder of the note in suit in good faith, free from any right of set-off existing in favor of the appellant against Henderson Cole, and discharged from any equities existing between the original parties to the note.

It is averred in the answer, that, at the time the appellee purchased the note sued on, he had no actual notice of the injunction issued against Henderson Cole at the suit of the appellant, nor that said note had been pledged to the bank; that he paid for said note \$600 in cash, and agreed to cancel notes which he held against M. E. Cole for \$400; but that he did not at the time actually cancel said notes, or surrender them to said Cole; that on the same day the appellee was notified of the claim of the appellant; that afterwards the appellant tendered to the appellee \$603.50, the amount paid in money for the note and the interest accrued thereon; that the appellee was, at the time he purchased the note, a director of the First National Bank of Elkhart.

We think, in view of the averment that the appellee was ignorant of the rights of the bank, the fact that he was one of its directors does not in any way affect the questions involved. The presumption that might otherwise result from his official relations to the bank, as to his knowledge of its securities and means, is not a conclusive presumption, and is entirely removed by the averment of his actual want of knowledge.

It is also insisted by the appellant, that as the appellee did not in fact cancel the debt due him from M. E. Cole, which he agreed to cancel, he can not be regarded as an innocent holder of the note, or that, in any event, he can not recover more than the appellant had tendered him.

The note was endorsed to the appellee in consideration of \$600 paid, and an agreement by the appellee to cancel a debt of \$400 due him from the endorser. The debt was not can-

Proctor v. Baldwin.

celled, nor the evidence of it surrendered to the endorser, nor discharged, unless the agreement to cancel operated as an extinguishment of it. The authorities are not quite agreed as to whether the purchase of a note for a previously existing debt is such a consideration as protects the endorsee or holder of commercial paper so purchased as against existing equities. "It is now quite well settled," says Parsons, "that where negotiable paper is received in payment and extinguishment of a pre-existing debt, the holder is entitled to protection." In most of the cases it is held that there must be an *actual* discharge of the debt and a surrender of the evidence of it. *Williams v. Little*, 11 N. H. 66; *Townsend v. Sumrall*, 2 Pet. 170-182; *Younge v. Lee*, 18 Barb. 187; *Farrington v. Frankfort Bank*, 24 Barb. 554.

In *Babcock v. Hawkins*, 23 Vt. 561, the court says: "The accord is sufficiently executed, when all is done, which the party agrees to accept in satisfaction of the pre-existing obligation. * * All that is requisite is, that the debtor should have executed the new contract to that point whence it was to operate as satisfaction of the pre-existing liability, in the present tense."

We are inclined to think that the endorsement and delivery of the note, pursuant to the agreement, operated as a present discharge and satisfaction of the debt agreed to be cancelled, and that the appellee is, for this reason, entitled to protection as an innocent holder of it. But, as we have concluded that his endorser, M. E. Cole, was a *bona fide* holder of the note, it is not necessary to decide this question, for the appellee must be deemed to hold the note free from all equities from which it was discharged in the hands of his endorser. *Thomas v. Ruddell*, 66 Ind. 326; *Hereth v. Merchants' Nat'l Bank*, 34 Ind. 380; *Smith v. Hiscock*, 14 Maine, 449.

We have assumed so far that the note sued on is commercial paper. If it is to be so regarded, the appellant admits that the second paragraph of the answer is bad. But he insists that the agreement contained in the note to pay attorney

Proctor v. Baldwin.

fees takes from it the character of commercial paper. He cites *Woods v. North*, 84 Pa. St. 407, *First Nat'l Bank v. Gay*, 63 Mo. 33, and *Jones v. Radatz*, 27 Minn. 240, which fully support his views. But this court has held otherwise. *Stoneman v. Pyle*, 35 Ind. 103; *Maxwell v. Morehart*, 66 Ind. 301; *Pate v. First Nat'l Bank of Aurora*, 63 Ind. 254.

We think there was no error in sustaining the demurrers to the answer.

PER CURIAM.—It is ordered, on the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

WOODS, J., was absent.

ON PETITION FOR A REHEARING.

MORRIS, C.—The appellant asks a rehearing in this case, for the reasons that, as he contends, neither M. E. Cole nor the appellee was an innocent holder of the note sued on, and because the instrument sued on is not a note.

We are disposed to adhere to the views expressed in the opinion, that Cole and the appellee were both innocent holders of the note; that it must be presumed, upon the facts stated in the answer, that Cole paid the bank, as he had agreed, the amount due it before he transferred the note to the appellee; and that the bank, through its officers, knew that the note had been transferred to him, and acquiesced in his title to it.

The appellant contends, with much earnestness, that the court erred in holding the paper sued on to be a note. It is as follows:

"\$1,000. GOSHEN, IND., Jan. 31st, 1880.

"Sixty days after date I promise to pay to the order of Henderson Cole one thousand dollars, payable at the St. Joseph Valley Bank, Elkhart, Indiana, for value received, without any relief whatever from valuation or appraisement laws, with ten per cent. interest from after due, and attorney fees.

WM. PROCTOR."

Proctor v. Baldwin.

It is argued that the promise in this note is not to pay a certain and specified amount, but an uncertain sum, a promise to pay \$1,000 and attorney fees; that the latter sum is clearly uncertain, and, when added to the \$1,000, as it must be to express the whole sum promised, the whole becomes uncertain; that the promise to pay attorney fees is a part of the instrument, and can not be separated from the promise to pay the preceding sum of \$1,000; that the promise necessarily embraces both sums. He also insists that fees may be earned before the notes become due; that if, by a fraudulent attempt of the maker to leave the State without paying or making provisions to secure the note, it might become necessary to procure a writ of *ne exeat* to secure the final payment, and to employ an attorney, then, in such case, the fees of the attorney would be within the promise. He distinguishes this from the case of *Stoneman v. Pyle*, 35 Ind. 103. In the case in 35 Ind., the promise was to pay attorney fees if suit should be instituted upon the note, while in the case now before us there is no such express condition.

The argument of counsel, to say the least of it, is plausible. We think, however, that while the precise condition expressed in the note in the case of *Stoneman v. Pyle*, is not implied in the note sued upon, the condition is implied that only such services as may be rendered after maturity shall be charged in the case before us; that the clear intention and understanding of the parties to the note were that the maker would pay such attorney fees as might be incurred by the holder of the note in its collection after it matured; that any attorney fees that might be contracted by the holder of the note, in securing it before due, were not within the contemplation of the parties at the time the note was executed, and, therefore, not within the promise. *Smock v. Ripley*, 62 Ind. 81; *Tuley v. McClung*, 67 Ind. 10.

In the case of *Stoneman v. Pyle*, 35 Ind. 103, it was held that a conditional stipulation to pay attorney fees, contained in a promissory note, did not destroy or affect its negotiability.

Keiser v. The State.

This case was decided eleven years ago, and has been followed by the cases of *Hubbard v. Harrison*, 38 Ind. 323, *Smock v. Ripley*, and *Tuley v. McClung*, *supra*. It has not been questioned in any subsequent case, but has been universally acquiesced in by the bar. It must be regarded as the law of this State.

Among others, counsel call our attention especially to the case of *Morgan v. Edwards*, 53 Wis. 599 (40 Am. R. 781). In this case, the court say: "A large number of cases have been cited which hold that if the amount payable at the maturity of the paper is fixed and certain—the instrument containing the other essentials of a note,—it is still a note, although it contains a further promise to pay an uncertain sum for expenses or costs of collection if not paid at maturity, or if suit be brought upon it."

True, the court holds that, where the promise is not made expressly conditional in the note, it is not to be held or construed as containing, by implication, such condition, but the promise is to be construed as absolute, binding the promisor to pay any fees or expense accruing in securing and collecting the note, whether incurred before, at or after the maturity of the note. We think that the construction of such a clause in a note, adopted by this court, is correct and in accordance with the intention of the parties to the instrument.

The petition for a rehearing is overruled.

No. 10,345.

KEISER v. THE STATE.

INTOXICATING LIQUOR.—*Sale or Gift.—Question of Fact.—Instruction.—Criminal Law.*—Whether the delivery of intoxicating liquor, by an unlicensed saloon keeper, to one who received and drank it, was intended by the

Keiser v. The State.

parties to be a sale or a gift, is a question of fact to be determined from all the evidence; and an instruction that if "the same was not then and there declared to be a gift, the law implies an agreement to pay the reasonable value thereof, and the transaction is a sale," is erroneous.

From the Henry Circuit Court.

D. W. Chambers and *J. S. Hedges*, for appellant.

D. P. Baldwin, Attorney General, and *L. P. Newby*, Prosecuting Attorney, for the State.

WORDEN, C. J.—Information against Keiser for selling intoxicating liquor to one Charles Lowe without a license.

Trial, conviction and judgment.

On the trial it was made a question whether defendant sold the liquor to Lowe or gave it to him.

On this point the court charged the jury as follows:

"If you are satisfied from the evidence that the prosecuting witness, Charles Lowe, at," etc., "asked of the defendant a drink of intoxicating liquor of any kind, if the defendant was then and there engaged in and running a saloon, and that the defendant then and there set out to him such liquor in a less quantity than a quart, and said Lowe then and there took and drank said intoxicating liquor, and then passed out and from the presence of the defendant, and that nothing was then paid therefor, and that nothing was then and there said on the subject of paying therefor, and that the same was not then and there declared to be a gift, the law implies an agreement to pay the reasonable value thereof, and the transaction is a sale," etc.

This charge was, in our opinion, wrong and well calculated to mislead the jury.

It was a question for the exclusive determination of the jury, in view of all the evidence in the cause, whether the transaction was intended by the parties to be a sale or merely a gift of the liquor. If intended by the parties to be a gift, the law implies no agreement to pay for the liquor, and the transaction can not amount to a sale.

The Louisville, New Albany and Chicago Railway Co. v. Murdock *et al.*

It might well have been inferred from facts and circumstances, that a gift and not a sale of the liquor was intended by the parties, though the transaction was not "then and there declared to be a gift."

Some other questions are made in the cause, which need not be considered, as the judgment must be reversed for the reason above given.

The judgment below is reversed, and the cause remanded for a new trial.

No. 8728.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. MURDOCK ET AL.

SUPREME COURT.—*Evidence.*—*Bill of Exceptions.*—Where a cause can not be fully considered or properly decided without an examination of the entire evidence, the bill of exceptions must affirmatively show that all the evidence is in the record.

From the Tippecanoe Circuit Court.

B. W. Langdon, for appellant.

J. R. Coffroth, for appellees.

ELLIOTT, J.—The appellees vigorously maintain that we can not consider any of the questions discussed by appellant, for the reason that it does not affirmatively appear that all of the evidence is in the record. It is true that the evidence is not shown to be all in the bill, and it is also true that the case can not be fully considered, or properly decided, without an examination of the entire evidence, and the contention of appellees must, therefore, prevail.

Judgment affirmed.

Petition for a rehearing overruled.

82	382
160	15
82	382
170	541

No. 8507.

PFISTER ET AL., BOARD OF COMMISSIONERS OF WHITE
COUNTY, v. THE STATE, EX REL. FOX.

MANDATE.—*Practice.*—*Affidavit.*—*Demurrer.*—The sufficiency of an affidavit, upon which a mandate is asked, may be tested by demurrer.

SAME.—*Alternative Writ.*—*Waiver.*—The parties may waive the issuing of the alternative writ of mandate.

SAME.—*Board of Commissioners.*—*Railroad Aid Tax.*—A mandate will lie against a board of county commissioners to compel them to take action upon the petition of a taxpayer of a township asking them to take stock in a railroad company to the amount of money collected on a tax voted for that purpose.

From the White Circuit Court.

J. H. Wallace, R. Gregory, C. H. Test and J. Coburn, for appellants.

N. O. Ross, A. W. Reynolds and E. B. Sellers, for appellee.

WOODS, J.—The appellee filed in the court below his affidavit and moved for a mandate against the appellants, as commissioners of White county. The appellants appeared in person and by attorney, “waived the issuing and service of process and alternative mandate,” and demurred to “the plaintiff’s complaint.” The court overruled the demurrer, and the defendants refusing to answer, or to show cause to the contrary, the court entered a peremptory mandate as prayed.

The error assigned is the overruling of the demurrer.

The appellee insists that the ruling presents no question, because, as was held in *Johnson v. Smith*, 64 Ind. 275: “The alternative writ of mandate embodying the affidavit upon which it issued * * is, in legal effect, the petitioner’s complaint; and a demurrer by the defendant should attack the writ and not simply the affidavit.”

In that case the alternative writ had issued; in this case it had not issued. The defendants expressly waived the issuing of it, and the question is, whether by so doing they lost the right to test the sufficiency of the application by demur-

Pfister et al., Board of Commissioners of White Co., v. The State, ex rel. Fox.

rer. Clearly not. If there was nothing to demur to, then there was nothing to give judgment upon in favor of the appellee after the overruling of the demurrer which was filed, a horn of the dilemma which the appellee probably has not intended to take, though it is the plain logic of his position.

The cases upon the subject were reviewed to some extent in *Gill v. State, ex rel.*, 72 Ind. 266, where it is shown that the sufficiency of the application or complaint has often been determined upon demurrer, without reference to the alternative writ when issued, as well as in cases where it had not issued.

There is no good reason why the meaningless formality of copying the complaint or application and accompanying documents into an alternative writ may not be waived, if, indeed, it ought to be permitted at all, under the code, which was designed to simplify the forms of action and procedure.

It is true, that the code provides, that the writ shall be issued upon affidavit and motion, that the first writ shall be in the alternative or peremptory, as the court shall direct, and that when a return shall be made to any such writ, issues of law and fact may be joined and like proceedings shall be had for the trial of issues and rendering judgment as in civil actions. Code of 1852, sections 740, 742; R. S. 1881, sections 1169, 1171. And in these particulars the proceeding differs from the ordinary action, but except in cases where the first writ ought to be mandatory, the parties should be allowed, as in an ordinary case, to appear, waive process or alternative writ, and form issues of law or fact; if of law, by demurrer; if of fact, by answer to the affidavit, conforming the proceedings, except in the particulars specified in the code, to the practice in ordinary cases.

This brings us to the ruling on the demurrer. Was that right?

The affidavit shows that, in pursuance of an election duly held for that purpose, Union township, of said county, had voted an appropriation of twenty-four thousand four hundred dollars in aid of the Indianapolis, Delphi and Chicago Rail-

Pfister et al., Board of Commissioners of White Co., v. The State, ex rel. Fox.

road Company; that at their ensuing session, in June 1874, the board of commissioners granted the prayer of the petition for said election and appropriation, and levied a tax of one per cent., and at the June session, 1875, levied a like sum, on the property of the township; that in pursuance of the order of the board made at the September term, 1878, the treasurer of the county had collected of the taxes so levied the sum of six hundred dollars, being five hundred and seventy-five dollars in excess of the costs of the said election; that said railroad company had fully constructed its railroad through said township; that trains of cars have passed and do pass over the same through said township, and did before March 5th, 1879; that on the 5th day of March, 1879, at the regular March session of said board, the affiant filed a petition, stating the facts as herein alleged, and praying that the board subscribe for stock of said railroad company to the amount of tax so collected, less the expense of the election, to wit, \$575, or, in the event they determine to make a donation in aid of the construction of said road, instead of taking stock, that they donate said sum; that, disregarding their duty in the premises, the said board refused to act on said petition, and refused to make the order prayed for or any other order, and refused to hear and determine said cause.

A number of objections are made to this affidavit, and questions are discussed in relation to the powers, duties and discretion of the board in respect to the subjects involved; but we do not find it necessary to consider them, though the more important have been already decided in the cases of *Reynolds v. Faris*, 80 Ind. 14, and *Faris v. Reynolds*, 70 Ind. 359.

It was the plain duty of the board to hear and grant or refuse the application of the appellee, so that he might prosecute his appeal or seek such other remedy as he should deem himself entitled to; and the board, having refused to entertain or act upon his petition, he was entitled to a mandate compelling them to proceed.

Simmon *et ux.* v. Larkin.

Whether the court ought to have ordered more than this, we need not decide, because no objection or exception to the order was taken, or motion made to modify it.

We are not to be understood as meaning that the hearing of the appellants' petition might not, for good cause, have been postponed or continued. It was the duty of the board to hear and determine, unless there was cause for postponement. The complaint alleges their failure and refusal to act upon the matter in any way, and if this is not true it should have been denied. The demurrer admits it.

Judgment affirmed, with costs.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

58	255
128	256

No. 9363.

SIMMON ET UX. v. LARKIN.

SUPREME COURT.—*Instructions.*—*Verdict.*—*Evidence.*—When the record affirmatively shows that the verdict was right upon the evidence, the judgment will not be reversed for error in instructions.

From the Tippecanoe Circuit Court.

C. E. Lake, J. S. McMillin and G. W. King, for appellants.
W. D. Wallace and J. D. Gougar, for appellee.

BICKNELL, C. C.—This was a suit by the appellants to rescind a contract because of fraud. The appellants were more than eighty years old; they were living on about forty acres of land owned by them; \$100 were due thereon for delinquent taxes; the improvements on the land were scanty and out of repair, and the appellants were too poor to make repairs. They exchanged their land with the appellee, reserving a life-estate in two acres, embracing dwelling-house, stable, garden,

Simmon et al. v. Larkin.

etc., for a house and lot in Lafayette, which rented for \$8 a month, and there was evidence tending to show that the house and lot were worth as much as the farm. The result of the exchange was that the appellants retained their messuage for life, had their delinquent taxes paid and secured an income.

The complaint averred that the appellants, by reason of old age and feebleness, were incompetent to transact business; that they were confiding in their natures, but the appellee had keen business tact and ability; that the farm was worth \$2,000, and its rental value \$200 a year; that the house and lot were worth only \$300; that the parties were neighbors and on terms of close intimacy and confidence; that the appellee, knowing that appellants were ignorant of the value of lots in Lafayette, and taking advantage of appellants' confidence in her, falsely and fraudulently represented to them that said house and lot in Lafayette were worth as much or more than said farm, and that they would do well to make said exchange; that the appellee also caused her brother-in-law to make like representations, all of which were false, but appellants relied on them and were thereby induced to make said exchange, which they would not have made had they not been ignorant of the value of real estate, and unduly influenced as aforesaid; that appellee took an advantage in said exchange, by reason of the "weakmindedness" of the appellants, and the trust and confidence reposed in her by them; that, since said exchange, the appellee has paid said \$100, due for delinquent taxes, and that before suit brought, the appellants tendered to her \$100 and a deed of reconveyance of said house and lot and demanded a reconveyance of the farm.

The complaint prayed that the appellants' deed be cancelled and that the appellee be ordered to reconvey the farm to the appellants, and demanded other proper relief.

The only false representations charged in the complaint are that the house and lot were worth as much as the farm, and that the exchange would be profitable for the appellants. These

Simmon *et ux.* v. Larkin.

were not representations of any facts ; they were merely statements of opinions.

A demurrer to the complaint for insufficiency was overruled, but the appellee has not assigned any cross errors. The appellee's answer was a general denial. The issue was tried by a jury, who found for the appellee.

A motion by the appellants for a new trial was overruled, judgment was rendered upon the verdict, and this appeal was taken. The only error assigned is, overruling the motion for a new trial.

Three reasons were alleged for a new trial, viz. :

"1. That the verdict is not sustained by sufficient evidence.

"2. That the verdict is contrary to law.

"3. Error of law occurring at the trial."

Upon the first two of these reasons, the appellants, in their brief, say: "As there was abundant evidence from which the jury might have found either way, we will not trouble the court to pass upon them."

Under the third reason, there are several specifications, all of them asserting error in refusing or giving instructions. The bill of exceptions shows that the verdict was right upon the evidence, and, therefore, the judgment could not be reversed for error in the instructions. *Casteel v. Casteel*, 8 Blackf. 240; *Caldwell v. Williams*, 1 Ind. 405; *Brooster v. State*, 15 Ind. 190. But in this case the instructions refused were rightly refused, and the instructions given by the court were as favorable to the appellants as they had a right to expect, under the allegations of their complaint. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

Heflin v. Bevis et al.

No. 9137.

HEFLIN v. BEVIS ET UX.

GUARDIAN AND WARD.—*Sale of Ward's Real Estate.—Payment by Cancelling Guardian's Debt.*—A guardian has no authority to receive his own note in payment of a claim belonging to his ward, and where a person purchases from him the real estate of his ward, and in payment of the price surrenders a note he holds against the guardian, and transfers notes held by him upon others, the guardian is liable on his bond for the price of the land.

SUPREME COURT.—*Instructions.—Verdict.—Evidence.*—An error in giving and refusing to give instructions will not reverse a judgment, when the verdict is clearly right upon the evidence.

From the Bartholomew Circuit Court.

R. Hill and J. W. Nichol, for appellant.

F. T. Hord and W. B. Hord, for appellees.

BEST, C.—Before the marriage of Catharine A. Bevis to her co-appellee, and during her minority, her guardian, William Stover, sold the undivided one-seventh of a certain quarter section of land in Bartholomew county, belonging to her, to the appellant for \$900, and this action was brought to recover the purchase-money, which, it was averred, had not been paid, but in lieu thereof certain indebtedness of the guardian to the appellant had been received and applied in its payment.

An answer of three paragraphs was filed. The first was a general denial; the second averred, in substance, that the sister of Catharine, Mrs. Wynn, owned the other undivided half of said seventh; that the appellant proposed to the guardian, that, if he would procure him a title for the entire seventh, he would pay him \$1,800, as follows: \$1,255 in cash, and surrender a note he held against him for \$545; that the guardian obtained the consent of Mrs. Wynn's husband to make such sale, and an order of the court to sell Catharine's interest, after which he sold him said land, for which he paid him \$1,255 in money, and surrendered a note he then held against said guardian, principal and interest amounting to \$545; that

Heflin v. Bevis *et ux.*

he did not know that the guardian would apply said note upon the interest of Catharine, and that he made the purchase in good faith, etc.

Issues were formed, a trial had, and a judgment rendered for the appellant. Upon appeal this judgment was reversed, because the second paragraph of the answer was insufficient. The case is reported as *Bevis v. Heflin*, 63 Ind. 129, where the complaint and answer are fully set forth.

After the cause was remanded, the appellant filed a fourth paragraph of answer, to which a demurrer was sustained. Reply filed, issues formed, trial had, verdict for the appellees, and, over a motion for a new trial, judgment entered upon the verdict.

The appellant insists, by the proper assignment of errors, that the court erred in sustaining the demurrer to the fourth paragraph of the answer, and in overruling the motion for a new trial.

When this cause was here before, the court, in passing upon the sufficiency of the second paragraph of the answer, said: "The appellees, in their argument, lose sight of the fact that Stover was only the agent of Mrs. Wynn and her husband, and that, as such agent, he had no right to accept anything but money for his principals. Story Agency, section 98. Heflin was not, therefore, justified in relying upon the alleged presumption that Stover would apply his note on Mrs. Wynn's portion of the purchase-money, in the absence of any agreement that it should be so applied."

To obviate the objection thus made to the second, the fourth paragraph of the answer was filed. The fourth is precisely like the second, except that in lieu of the averments, "that said Stover fully acquainted said Hayes H. Wynn with said defendant's proposition, and thereafter, with the full knowledge and consent of said Wynn, said Stover accepted said proposition," it was averred "that said Stover thereafter fully explained to said H. H. Wynn, and said Esther, his wife, the said proposition and offer of said defendant, Heflin, and espec-

Heflin v. Bevis *et ux.*

ially that part thereof in relation to said note of said Stover, and upon being so informed by said Stover of the nature of said Heflin's said proposition, said Wynn and wife agreed to accept the same, and authorized said Stover to accept the same on their behalf, and further authorized said Stover to accept and receive said note of said Stover owing to said Heflin as a part of the purchase-money due upon the purchase by said Heflin of said real estate if said Heflin should purchase the same upon the terms by him proposed as above set forth, and thereafter said Stover, acting as agent for said Wynn and wife, and being by them thereunto fully authorized, and also acting as guardian for said Catharine, accepted said proposition of said Heflin, so made as aforesaid."

This change did not, in our opinion, render the paragraph sufficient. The note in question was received in payment of a part of the purchase-money for the entire interest sold. The guardian had no authority to accept it in payment of Catharine's interest, and it is not averred that it was received in payment of Mrs. Wynn's interest. This fact we are asked to infer, because it is averred that the appellant's proposition was fully explained to Mrs. Wynn, and that she authorized Stover "to accept and receive said note * * * as a part of the purchase-money * * * of said real estate." This we can not do. Concede that Mrs. Wynn authorized Stover to sell her interest and accept the note in part payment of the purchase-money, yet it is not averred that he did it. The averment is that, as agent for Mrs. Wynn and as guardian of Catharine, he accepted appellant's proposition, which was, not to apply the note upon the purchase-money of Mrs. Wynn's interest, but to apply it upon the purchase-money of both interests. These averments utterly failed to show that the appellant paid the money upon Catharine's interest, and therefore the paragraph was insufficient.

The motion for a new trial embraced many reasons. Among others, it is insisted that the verdict is not sustained by sufficient evidence, and is contrary to law.

Heflin v. Bevis et ux.

The evidence established the sale. The payment of the purchase-money was thus detailed by the appellant and H. H. Wynn, one of his witnesses:

"I am defendant in this action. Some six weeks or so before I purchased the real estate, I proposed to Stover that I would buy the interest of his two daughters in their grandfather's real estate, provided I could get them both, but that I would not buy one of their interests by itself. I told him I would pay, for the interest of both, \$1,800, as follows: I would give him a note on George Gohn, a note on William Schooler, the exact amount of either of which I do not now recollect, and his own note which I then held for \$519.70, all of which notes bore ten per cent. interest from date, and Stover's had been running from the previous Christmas, and I would pay the balance in money—about \$300. They were all then due. He said he would see Wynn and wife in regard to the matter, and report to me what they said. Some two or three weeks afterwards I saw him again, and he said he had seen Wynn and wife and explained my proposition to them, and that they were satisfied with it, and had authorized him to act for them in making the trade, and we then arranged to come to Columbus and close up the trade. Shortly after that, I met Wynn and Stover at Stover's house. We came to W. W. Herod's office at Columbus to close it up. * * * * The interest was then counted up on the notes, and the notes of Gohn, Schooler and Stover and \$100 in money were handed to Herod and he handed them to Stover. I gave my own note to Stover for \$100, because there was talk of an attempt to break old man Steinbarger's will, and I wanted to hold back that much on the purchase-money until that question was settled. I paid that note, with ten per cent. interest, about a year after."

H. H. Wynn testified that he thought the appellant had paid \$200 in cash, had given his note for \$100 and had transferred a note made by George Gohn, a note made by William

Heflin v. Bevis *et al.*

Schooler and surrendered a note made by Stover in payment of the purchase-money; that afterwards Stover had given witness appellant's note, which he had collected; had transferred him the Gohn note of \$125, the Schooler note of \$525 and paid him the residue of the \$900 in money.

The testimony of these witnesses warranted the jury in finding that nothing had been paid upon the interest of Catharine. It is not shown that a cent was paid that Wynn did not receive. It is idle to assume that the money paid was paid upon the interest of Catharine and afterwards misappropriated by the guardian when he paid it to Wynn. Again, if the small amount of money paid was in fact paid upon Catharine's interest, there is no pretence that the balance due her was paid, and for this the appellant was clearly liable. The verdict was right upon the evidence.

The appellant complains because the court refused to give instruction numbered three asked by himself, and because it gave of its own motion instructions numbered eleven and sixteen.

We have not examined these instructions, as this court will not reverse a judgment when the verdict is clearly right upon the evidence, though an instruction asked and refused was proper and those given erroneous, as it is obvious that the appellant was not injured by the action of the court. *Lafayette, etc., R. R. Co. v. Adams*, 26 Ind. 76; *Felkner v. Scarlet*, 29 Ind. 154; *Wallace v. Cravens*, 34 Ind. 534.

No other questions are raised. There is no error in the record and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed in all things, at the appellant's costs.

Bunnell v. Farris.

No. 9478.

• BUNNELL v. FARRIS.

TAXES.—Action Against County Treasurer for Selling Real Estate.—Complaint.

—Personal Property.—A complaint against a county treasurer to recover damages for selling the plaintiff's lands for taxes, which alleges that the plaintiff had personal property within the county sufficient to make the taxes, and so informed the defendant, but fails to allege the character of the personal property, and that it was subject to seizure and sale, and that the property was shown to the officer, is bad on demurrer.

From the Carroll Circuit Court.

R. Gregory, for appellant.

J. H. Wallace, for appellee.

ELLIOTT, J.—It is alleged in the appellant's complaint, that appellee is the treasurer of White county; that appellant is the owner of certain lands in that county; that taxes assessed against his property became delinquent, and were so returned to the treasurer; that a deputy treasurer called at the appellant's house and demanded payment; that the deputy was informed that he, the appellant, had personal property in the county to the value of fifteen hundred dollars; that he was in fact the owner of personal property of that value; that he was informed by the deputy "that he did not care; that he would sell every foot of land owned by the appellant;" that thereafter the treasurer did sell the land.

Conceding, but not deciding, that a treasurer is liable for selling real estate when the taxpayer has personal property out of which the taxes could be made, the complaint is bad. A complaint in such a case should show the character of the personal property, and that it was subject to seizure and sale. It is not enough to show that the taxpayer informed the officer that he was the owner of personal property; it must also show that it could have been reached by the process in the hands of the treasurer.

The presumption is that the public officer did his duty, and one who seeks a recovery upon the ground that a breach of

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

duty was committed, must affirmatively state such facts as constitute a breach. An officer can not be mulcted in damages unless it be made to appear that he has not performed his duty. For anything that appears, the personal property which the appellant claims to have owned may not have been within the officer's reach. A taxpayer, of whom taxes is demanded, ought to exhibit to the treasurer personal property out of which the taxes can be collected, if he would secure a cause of action for levying upon and selling real estate. It is the duty of the person owing the taxes to pay them, and the duty of the treasurer in default of payment to levy upon and sell property. While personal property is the primary fund out of which taxes are to be paid, still the treasurer is not, at least as against the taxpayer, bound to resort to extraordinary means or diligence to find personal property to sell in discharge of taxes which are a specific lien upon the land which he actually sells.

In order to make the treasurer in such a case liable in damages, it is certainly necessary for the plaintiff to affirmatively show that there was personal property, which, by ordinary diligence, the officer could have seized and sold. It may be true, that the taxpayer has such property, and yet equally true that the officer could not seize it under his warrant. There is nothing in the present complaint showing that there was any personal property accessible to the appellee.

The court did right in sustaining the demurrer to the complaint.

Judgment affirmed.

No. 8171.

JEFFERSONVILLE, MADISON AND INDIANAPOLIS RAILROAD
COMPANY v. OYLER.

VENDOR AND PURCHASER.—*Adverse Possession.*—*Statute of Limitations.*—The possession of lands by a vendor is subordinate, and not adverse, to the rights of his vendee, and the statute of limitations does not run during its continuance, so that the time thereof can be added to the time during

89	394
127	463
83	394
136	658

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

which a subsequent purchaser may hold, so as to make a sufficient period to bar the rights of the first purchaser.

SAME.—Notice.—Possession.—Where the owner of a farm sells a portion, and the purchaser takes possession of a part only of the portion so sold, the vendor retaining possession of and using the residue as part and parcel of his farm, and said conveyance is not recorded, the vendee's possession of the part occupied and used by him is not constructive notice to a subsequent purchaser of the farm of the extent of his purchase.

SAME.—Mere possession is notice of a vendee's rights to land actually enclosed and occupied.

From the Johnson Circuit Court.

S. Stansifer and — *Stansifer*, for appellant.

S. P. Oyler, for appellee.

MORRIS, C.—The appellee brought this suit to quiet his title to a portion of lots sixteen, twenty, twenty-one and twenty-three in Hamilton and Oyler's addition to the city of Franklin, in Johnson county, Indiana. The complaint alleges that the appellee is the owner in fee of said lots; that the track of appellant's road crosses the western end of said lots; that the west line of said lots is the center line of said road; that a portion of said lots, not exceeding fifteen feet in width, on the west end of the same, is amply sufficient for the proper maintenance of the track of said road, and for the safe and secure passage of trains thereon; that for more than twenty years last past, and until the 21st of July, 1875, no greater portion than fifteen feet of the west end of said lots had been used or appropriated for the right of way across the same for railroad purposes; that the appellant is setting up a pretended title and claim to fifty feet in width on the west end of said lots, and that it had, on the 2d of July, 1875, without the consent of the appellee, erected on said lots, at a distance of fifty feet from the center line of its road, posts and a plank fence, thereby obstructing the appellee's use of said lots; that such acts create a cloud upon the appellee's title to the lots. The appellee prays that his title to said lots be quieted, and for two hundred dollars damages.

To this complaint the appellant filed a counter-claim, in

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

which it is stated that one Garrett C. Bergen, being the owner of the northeast quarter of section fourteen, in township twelve north, of range four east, embracing the lots described in the complaint, on the 22d day of June, 1843, sealed, executed and delivered to the Madison and Indianapolis Railroad Company, to whose rights the appellant has succeeded, a release or conveyance of a strip of land one hundred feet in width, as the right of way for the road of said company for so much of said road as might or should pass through said quarter section of land; that said road was finally constructed through said quarter section of land, according to the survey, and on the center line of said one hundred feet so conveyed to it by said Bergen; that said Madison and Indianapolis Railroad Company took possession of said strip of land and occupied and used the same until it consolidated with the Jeffersonville and Indianapolis Railroad Company; that the consolidated company, being the appellant, has ever since used and occupied the same; that the right of way so conveyed by said Bergen embraced and included that portion of the lots described in the complaint now in dispute; that said Bergen and wife, on the 8th day of November, 1865, conveyed a part of said quarter section to Robert Hamilton and the appellee, and that Hamilton afterwards conveyed to the appellee his interest in the lots described in the complaint, they being part of the land so conveyed by Bergen and wife to Hamilton and the appellee; that the only title of the appellee to said lots is derived from Bergen through his deed to him and Hamilton.

The appellee answered this counter-claim in three paragraphs. The first was a general denial; the second, a denial under oath.

The third paragraph of the answer admits, that, on June 22d, 1843, Garrett C. Bergen was the owner in fee of the northeast quarter of section fourteen, described in the counter-claim; that the Madison and Indianapolis Railroad Company, in 1847 and 1848, located its road across said quarter sec-

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

tion ; that from that time until July, 1875, said company and its successors in running and operating said road over and through said quarter section, and particularly over that part of said land embraced by the lots described in the complaint, wholly abandoned any and all use, occupation and claim to any part of the same upon the east side of its railroad track, except so much as is included in a strip fifteen feet in width eastward from the center of said railroad track, and did not, during said time, use or occupy any part of said land except said strip fifteen feet in width on the east side of said center line of said road ; that from 1850 until May, 1865, Bergen, with the full knowledge and consent of the Madison and Indianapolis Railroad Company and its successors, and without objection, took and held exclusive possession of all of said quarter section which lies east of the center line of said railroad, except said strip of fifteen feet in width ; that he enclosed and farmed the same, and thereby excluded the railroad company from it. It is then stated that in May, 1866, Bergen and wife conveyed said land to Hamilton and the appellee, who took possession of the same, properly and legally laid off into city lots a portion of it as Hamilton and Oyler's addition to the city of Franklin ; that said addition included the lots named in the complaint ; that Hamilton and Oyler occupied and held the exclusive and continuous possession of said land to the exclusion of all other persons, until Hamilton conveyed his interest to the appellee ; that he thereafter, and until the 21st day of July, 1875, held the exclusive possession of said premises, with the consent and knowledge of the appellant ; that Bergen, Hamilton and Oyler and the appellee, respectively, held the possession of said premises, claiming the same, respectively, as their own against the appellant and all others ; that on the 21st day of July, 1875, the appellant, without the consent of the appellee, entered upon said lots as stated in the complaint. It is averred that at the time Hamilton and the appellee purchased said land from Bergen, they had no knowledge that the ap-

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

pellant claimed or pretended to have any title to or interest in said land, except said strip of fifteen feet in width on the east side of said center line of said railroad; that there was no conveyance or release from said Bergen to the Madison and Indianapolis Railroad Company, or its successor, recorded in said Johnson county, or elsewhere in the State.

The appellant demurred to the third paragraph of the answer to its counter-claim. The demurrer was overruled. The cause was submitted to a jury for trial, and a verdict returned for the appellee. The appellant moved the court for a new trial; the motion was overruled, and judgment rendered upon the verdict in favor of the appellee.

The rulings of the court upon the demurrer to the third paragraph of answer to the cross complaint, and upon the motion for a new trial, are assigned as errors.

A motion was made by the appellant to strike out a portion of the answer to the counter-claim, which was overruled by the court. The appellant does not mention the action of the court upon the motion in his brief. It will not, therefore, be further noticed.

The appellant insists that the demurrer to the third paragraph should have been sustained; that Bergen is alleged to have retained possession of the land in dispute from the time he conveyed it to appellant, as its grantor, until he conveyed to Hamilton, and the appellee, claiming and using the land as his own, and that Hamilton and the appellee have held the exclusive possession of the same, adversely to the appellant; that the possession of Bergen, Hamilton, and the appellee, has been continuous for more than twenty years. The appellant treats the answer as setting up the statute of limitations as a defence, and insists that, unless the possession of Bergen is shown to have been adverse to it, the answer, regarded as a plea of the statute of limitations, is bad.

It is alleged in the cross complaint that Bergen, while the owner of the land in dispute, conveyed it to the appellant. It is insisted, and correctly we think, that his possession of a

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

part of the premises released to the appellant was not adverse to it. He will be deemed to have held subordinate, and not adverse to the title of his grantee. *Jackson v. Burton*, 1 Wend. 341; *Doe, ex dem. Marston, v. Butler*, 3 Wend. 149; *Beach v. Catlin*, 4 Day, 284, 295 (4 Am. Dec. 221); *Higginson v. Mein*, 4 Cranch, 415; *Rowe v. Lewis*, 30 Ind. 163. We understand the case of *Vanduyne v. Hepner*, 45 Ind. 589, to be in substantial agreement with the above cases. We think the possession of Bergen, from the time he released the right of way to the railroad company, was not adverse to it or to its successors, but that he occupied the land in subordination to the rights of the company. As it appears by the answer that twenty years have not elapsed since Bergen conveyed to Hamilton and Oyler, it follows that if, upon the facts stated, Bergen is to be considered as holding in subordination to the title of his grantee, the Madison and Indianapolis Railroad Company, and its successors, the answer, considered only as a plea of the statute of limitations, is bad. As between Bergen and his grantee, the possession of the former will be deemed to be the possession of the latter. This rule, however, applies only as between the parties, and while it would prevent the running of the statute of limitations against the appellant during the occupancy of Bergen, a third person, dealing with Bergen for the land, as the owner and occupant of it, would not be chargeable with notice of the relations existing between him and his grantee, unless the conveyance through which his grantee claimed was properly recorded, or the fact was otherwise brought to the knowledge of such third person.

The pleadings show that Bergen conveyed the land in dispute to Hamilton and Oyler in May, 1866; that he was then in the actual occupancy of it, had it enclosed and was cultivating and farming it as his own; that the purchasers, Hamilton and Oyler, had, at the time, no knowledge that the appellant had any claim to or interest in the land, and that there was no record of any conveyance from Bergen to the Madison and Indianapolis Railroad Company.

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

The conveyance of the land by Bergen and wife to Hamilton and Oyler was the strongest assertion on their part that the land belonged to them. It does not appear that the deed contained any covenants of title, but it does appear that the land occupied by Bergen was conveyed to Hamilton and Oyler. The conduct of Bergen, as stated in the pleadings, was, to say the least of it, equivalent to an assertion on his part that he was the owner of the land at the time he conveyed to Hamilton and Oyler. If a tenant, in possession, affirms himself to be the owner, he will, as to third parties having no actual or constructive knowledge of his tenancy, be regarded as the owner. *Beatie v. Butler*, 21 Mo. 313; *Flagg v. Mann*, 2 Sumner, 486, 557; *Barnhart v. Greenshields*, 28 Eng. L. & Eq. 77. Nor would the possession of the appellant of a strip fifteen feet in width, on the east side of the center line of its track, be notice of title to any more of the land than the strip so occupied. *Krider v. Lafferty*, 1 Whart. 303.

We think the third paragraph of the answer to the counterclaim shows that Hamilton and Oyler were innocent purchasers of the land in controversy from Bergen, for a valuable consideration, without notice of the rights of the appellant, and that the court did not err in overruling the demurrer to it.

The appellant insists that the court erred in overruling its motion for a new trial, by refusing to give the jury the following instruction:

"If you find that Garrett C. Bergen executed the release mentioned in the cross complaint, and that, after its execution, he remained in possession of all the 100 feet strip mentioned therein, until the purchase by Oyler and Hamilton, the law presumes that said Bergen held such possession as the tenant, or by the license of the grantee in said release, and such possession of said Bergen would not be adverse to the title of the grantee in said release."

This instruction was, we think, pertinent. We think it is the law and should have been given to the jury. Where the grantor remains in possession of the land granted, the law

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

will not presume that his possession is against his deed. The reasonable and legal presumption is that such possession is with the permission of the grantee, and subordinate to and consistent with the grant. It is insisted by the appellee that the release conveyed no title to the Madison and Indianapolis Railroad Company, and that, therefore, there was no error in refusing to give the instruction asked. This question has been before this court and decided, correctly we think, adversely to the appellee. *Jeffersonville, etc., R. R. Co. v. Oyler*, 60 Ind. 383.

It is also insisted that the appellant failed to prove that it had succeeded to the rights of the Madison and Indianapolis Railroad Company. This may be, but the right of the appellee to maintain the action depended upon his title to the land described in his complaint, and it was competent for the appellant to prove any fact alleged in its answer which tended to show a want of title in the appellee. As we think the court erred in refusing to give the instruction asked by the appellant, and that, for that reason, a new trial must be granted, we need not examine the other grounds urged in support of the motion for a new trial.

The appellee has assigned cross errors, as follows:

“ 1. The court erred in overruling the demurrer to the cross complaint or counter-claim.

“ 2. The court erred in permitting, over the objection of the appellee, to be read to the jury, as evidence in the cause, the lease of the Jeffersonville, Madison and Indianapolis Railroad Company to the Pittsburgh and Cincinnati Railroad Company.

“ 3. The court erred in permitting, over the objection of the appellee, to be read as evidence in the cause, the release purporting to be from Garrett C. Bergen to the Madison and Indianapolis Railroad Company.

“ 4. The court erred in permitting, over the objection of the appellee, to be read to the jury as evidence in the cause,

Jeffersonville, Madison and Indianapolis Railroad Company v. Oylor.

the deed of D. G. Rose, Marshal of the United States, to E. Day and others.

"5. The court erred in permitting, over the objection of the appellee, to be read to the jury the articles of association of the Indianapolis and Madison Railroad Company and the record of the organization of said company.

"6. The court erred in permitting, over the objection of the appellee, the articles of consolidation of the Jeffersonville Railroad Company with the Indianapolis and Madison Railroad, to be read to the jury."

The question raised by the first cross error, was passed upon by this court, 60 Ind. 383. We approve the decision there made.

We agree with the opinion expressed by the appellee in his brief, that if there was any error in admitting the evidence refused in the second cross error assigned, it was harmless.

There is nothing in the third cross error. The nephew of Garrett C. Bergen testified that he had seen Garrett C. Bergen write, and that he could recognize his handwriting; that his signature to the release was, in the opinion of the witness, genuine. One witness testified that he had been in possession of the instrument for many years, and that it was the same as when he first saw it. The release was more than thirty years old. There was no error in its admission.

Nor was there any error in admitting the marshal's deed to Day and others, and the articles of association and the record of the organization of the Indianapolis and Madison Railroad Company. The evidence might have constituted links in the chain of evidence necessary to establish the appellant's rights.

The objection to the articles of consolidation, read in evidence by the appellant, between the Jeffersonville Railroad Company and the Indianapolis and Madison Railroad Company, is, that no such companies are alleged in the counter-claim to have consolidated; but if, in the counter-claim, the consolidating companies were misnamed, the court below would, upon motion, have allowed upon the trial an amendment of the counter-claim, by

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

inserting in it the true names of the consolidating companies. The counter-claim, as to the variance between the proof and the allegation, may be regarded as amended in this court. *Krewson v. Cloud*, 45 Ind. 273; *Hamilton v. Winterrowd*, 43 Ind. 393.

We think the judgment should be reversed, at the costs of the appellee.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellee.

ON PETITION FOR A REHEARING.

MORRIS, C.—The appellant files a petition for a rehearing in this case. Its counsel insist, with much apparent earnestness and sincerity, that the court erred in holding the third paragraph of the appellee's answer to its cross complaint good.

If we assume, as perhaps we may, that the instrument executed by Bergen and wife to the appellant's predecessor is sufficient in form to convey a strip of land fifty feet in width off the west side of the land, afterwards conveyed by Bergen and wife to Oyler and Hamilton; that the appellant constructed a part of its road upon, fenced in, and continuously occupied a strip fifteen feet in width off the west side of said fifty-foot strip; that Bergen remained in the actual occupancy of the balance of the fifty-foot strip, being the land now in controversy, using and claiming it as his own; that while the land in controversy was thus occupied by Bergen, he conveyed to Oyler and Hamilton, by warranty deed and for a valuable consideration, all that part of the quarter section of which the fifty-foot strip was a part, lying east of the center line of the appellant's road, without actual notice of the conveyance of the fifty-foot strip to the appellant, and that the conveyance to the appellant had never been recorded, the question is, and it is the only question discussed by the appellant, was the occupancy of the strip, fifteen feet in width, by the appellant, constructive notice to Oyler and Hamilton,

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

under the circumstances stated, of its right to and deed for the fifty-foot strip?

It is true, that actual, visible and exclusive possession is constructive notice of the rights of the occupant. The rule is well stated in the case of *Noyes v. Hall*, 97 U. S. 34. It has been so held in this and many other States. In the cases of *Crassen v. Swoveland*, 22 Ind. 427, *Paul v. Connersville, etc., R. R. Co.*, 51 Ind. 527, and others referred to by the appellant, the same rule is asserted.

And it may be admitted, as held in the case of *Bell v. Longworth*, 6 Ind. 273, that, as a general rule, where one enters under color of title by deed and improves the land, he acquires, in law, actual possession to the extent of the boundaries contained in the deed. But, in the very nature of things, this can only be the case where such possession is exclusive. The rule can not apply where, at the time the entry is made, a portion of the estate embraced by the deed is in the actual possession and use of another. Where the land is unoccupied, the party entering under a deed or writing may well be presumed to intend to take and hold the entire estate. No such presumption can arise, however, where a part of the estate is in the actual and apparently adverse possession of another. A mixed possession can not be exclusive, nor operate as notice of an unrecorded deed, nor of the rights of one not in actual possession.

The precise question here involved has, so far as we have been able to find, arisen in but few reported cases.

Washburn, in speaking of the possession of one holding under an unrecorded deed, as notice of the contents of such deed, says: "But where a vendor sold a part of his estate, and retained a part, and both he and his vendee occupied the premises, it was held not to be a notice of the purchase. To have that effect, it must be exclusive, open, and notorious, such as enclosure, cultivation, erection of buildings, and the like." Vol. 3, 4th ed., p. 318.

In the case of *Ely v. Wilcox*, 20 Wis. 551, it is said that

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

“possession to be notice must be open, visible, exclusive and unambiguous.” The same was held in the case of *Patten v. Moore*, 32 N. H. 382. A mixed or ambiguous possession does not meet the requirements of the rule. *Bell v. Twilight*, 2 Foster, 500; *Bush v. Golden*, 17 Conn. 594.

In *Billington v. Welsh*, 5 Binney, 132 (6 Am. Dec. 406), it was held that where the defendant went into possession under a parol agreement for the purchase of a part of a tract of land, and erected a mill and out-buildings for his workmen, but the boundary was not defined, and there were buildings of the same kind on the unsold portion of the tract, which were used for like purposes by the vendor, so that the whole would strike the eye as one establishment, the defendant's possession did not operate as notice to a purchaser at sheriff's sale under an execution against the vendor.

In the case in hearing, Bergen was, at the time he conveyed to Oyler and Hamilton, in the actual possession of the land in dispute, had the apparent and recorded title to it, was using and cultivating the same as his own and as he was using his other land within the same enclosure, with nothing to mark or separate it from the farm sold and conveyed to Oyler and Hamilton, or to indicate that the appellant had any right to or interest in it,

In the case of *Smith v. Yule*, 31 Cal. 180, it was held that if the apparent possession of land is consistent with the title appearing of record, it is not the duty of the purchaser to make any enquiry concerning the title beyond what the record shows. It was further held, that if, at the time of the sale of land, the record title is in the vendor, and he is in possession, and another person is also in possession of a part of the premises, there is no presumption of title out of the vendor, and no enquiry need be made of the other person as to his right or title. The facts in the above case are not unlike those in the case before us.

In the case of *Bennett v. Robinson*, 27 Mich. 26, it was held that the possession of the grantor, long after the delivery and

Jeffersonville, Madison and Indianapolis Railroad Company v. Oyler.

recording of his deed to a purchaser, justified the inference that he had obtained some right to or interest in the premises. The following cases will be found to support the cases above referred to, especially the case of *Smith v. Yule*: *Dutton v. Warschauer*, 21 Cal. 609; *Fair v. Stevenot*, 29 Cal. 486; *Kendall v. Lawrence*, 22 Pick. 540; *Hewes v. Wiswell*, 8 Greenl. 98; *Butler v. Stevens*, 26 Me. 484.

The cases referred to by the appellant do not relate to the question of a mixed possession. We think they do not meet the peculiar facts set up in the pleading demurred to, nor show that Oyler and Hamilton were not innocent purchasers. We know of nothing in the appellant's charter, or the law, which required it to procure or own a right of way 100 feet in width. It would have been lawful for it to have acquired from Bergen and used a strip of land thirty feet wide for its right of way. No inference can be drawn, therefore, from the fact that the appellant is a railroad company, as to its rights to or interest in the land in dispute. Its possession was notice of its rights to the land, which it had enclosed and occupied, but not to that which it had not enclosed nor actually occupied, but had left in the actual use, occupancy and apparent ownership of Bergen.

The appellant insists that the conclusion we have reached is opposed to the decision in this case when here before, 60 Ind. 383. The appellee had demurred to the counter-claim or cross complaint. The court held the counter-claim good. It is averred in the counter-claim that the appellant had continuously occupied all the land in dispute prior and up to and at the time that Oyler and Hamilton purchased. We think the counter-claim was good as held by the court. It did not appear by the counter-claim that Bergen was, at the time he conveyed to Oyler and Hamilton, in possession of any part of the strip of land conveyed to appellant. But the answer demurred to alleges that it was so in Bergen's possession, and that he used and claimed it as his own.

PER CURIAM.—The petition is overruled.

Stevens v. Alexander, Administrator.

No. 9515.

STEVENS v. ALEXANDER, ADMINISTRATOR.

PROMISSORY NOTE.—*Assignee and Assignor.*—*Due Diligence.*—Where the maker of a promissory note becomes a non-resident of this State, after the assignment of the note and before its maturity, due diligence does not require the assignee to pursue the maker out of the State, before he can maintain an action against his immediate or remote assignor. But the rule is different where the maker of the note is a non-resident of this State, at the time of the assignment; for, in such case, the assignee must pursue the maker with due diligence, or show that such diligence would be unavailing, in order to maintain his action against the assignor.

From the Orange Circuit Court.

W. Farrell, for appellant.

W. J. Throop, for appellee.

Howk, J.—In this case, the appellee sued the appellant as the assignor of three promissory notes, not payable at a bank in this State. The cause, having been put at issue, was tried by the court, and a finding was made for the appellee; and, over the appellant's motion for a new trial, the court rendered judgment on its finding.

In this court, the first error complained of by the appellant is the decision of the circuit court, in overruling his demurrer to appellee's complaint. In his complaint, the appellee alleged, in substance, that one John Courtney, on September 1st, 1873, by his three promissory notes, promised to pay to the order of the appellant, \$398, with ten per cent. interest from date; that the appellant assigned in writing the said notes to the appellee's intestate, and copies of the said notes and of the said assignments thereof were filed with and made parts of the complaint; and that, at the maturity of said notes, the said John Courtney was, ever since had been, and then was a non-resident of the State of Indiana; wherefore, etc. The copies of the assignments, filed with the complaint, show by the dates thereof that each of the three notes was assigned long before its maturity, by the appellant, to appellee's intestate.

Stevens v. Alexander, Administrator.

It is earnestly insisted by the appellant's counsel, that the complaint in this case was bad on the demurrer thereto, for the want of sufficient facts, for the following reasons:

"1. It does not allege that, at the time of the assignment, the maker of the notes resided within the State of Indiana.

"2. It does not allege that the notes were assigned within the State of Indiana.

"3. It does not allege that the notes were executed within the State of Indiana."

In section 4 of the act of March 11th, 1861, concerning promissory notes, etc., sec. 5504, R. S. 1881, it is provided that any assignee of such a note, "having used due diligence in the premises, shall have his action against his immediate or any remote endorser." Where the assignee of such a note brings his action against the assignor thereof, he must allege in his complaint such facts as will show that, having used due diligence in the premises, he has failed to collect the note, or some part of it, from the maker thereof, or such facts as will legally excuse him from the use of such due diligence.

It will be seen from our summary of the complaint, in this case, that the appellee has alleged therein, as an excuse for his failure to use due diligence against the maker of the notes in suit, the fact of the non-residence of such maker, in this State, at and since the maturity of such notes. We do not think that this allegation was sufficient to constitute a valid or legal excuse for his failure to use due diligence in the premises against the maker of the notes, or to show a cause of action in appellee's favor against the appellant, as the assignor of such notes.

In *Bernitz v. Stratford*, 22 Ind. 320, it was held by this court, that, if the maker of the note became a non-resident of the State, after the assignment thereof, due diligence does not require that the assignee should pursue the maker out of the State, before he could have his action against his immediate or remote assignor. A different rule obtains, however, where the maker of the note is a non-resident of this State, at the

Halladay *et al.* v. Wellington.

time of the assignment; for, in such a case, the assignee must pursue the maker with due diligence, or show that such diligence would be unavailing, in order to have and maintain his action against the assignor.

We are of the opinion, therefore, that the appellee's complaint in this case was bad, on the demurrer thereto, for the want of an additional averment therein, to the effect that the maker of the notes in suit became a non-resident of this State, after the assignment thereof. We do not think, however, it was necessary that the complaint should have alleged that the notes were either executed or assigned within this State; but, for the first reason assigned by the appellant's counsel and heretofore quoted, it seems to us that the trial court erred in overruling the demurrer to appellee's complaint.

This conclusion renders it unnecessary for us to consider and decide any question arising under the alleged error of the court, in overruling appellant's motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint, and for further proceedings.

No. 9291.

HALLADAY ET AL. v. WELLINGTON.

SUPREME COURT. — *Evidence.* — *Commission Merchant.* — *Counter-Claim.* —

Where, to a suit for commissions, expenses, etc., in selling flour, a counter-claim for damages for neglect to sell for the best price obtainable, after direction by the defendant, is pleaded, and a verdict and judgment is rendered for the defendant thereon, the Supreme Court will not disturb the judgment on the weight of the evidence.

From the Madison Circuit Court.

A. T. Harrison and J. A. Harrison, for appellants.

C. D. Thompson, for appellee.

Halladay et al. v. Wellington.

FRANKLIN, C.—Appellants, as commission merchants in the city of New York, sued appellee for a balance on commissions, freight and expenses in selling flour for him.

Appellee admitted appellants' account, and answered by way of counter-claim for damages, for not selling the flour when directed for the highest price that could then have been obtained for the same. Trial by jury; verdict for appellee on his counter-claim in the sum of \$155.44; and, over a motion for a new trial, judgment was rendered on the verdict.

The only error assigned in this court is the overruling of the motion for a new trial. And the only reason stated for a new trial is, that the verdict is not supported by sufficient evidence.

The evidence shows that appellee was a miller doing business in the city of Anderson, Indiana, and had been in the habit of shipping flour for sale to appellants as commission merchants in the city of New York, appellants advancing money on shipments and paying freights, storage, inspection, insurance, etc.

Under such arrangement appellee on the 27th day of December, 1879, shipped to appellants 125 barrels of flour, with instructions to sell at not less than \$7.25 per barrel.

On the 9th of March, 1880, he made a further shipment of 125 barrels, with instructions to sell at the best price that could be realized. On the 13th of March, 1880, he wrote to appellants to sell the first shipment for not less than \$6.75. On the 5th of April, 1880, he wrote to appellants to sell all the flour, without limit as to price.

Appellants had advanced at the time, on the first shipment \$650, and on the second shipment \$625. On the 8th day of May, 1880, appellants sold 125 barrels at \$5.75 per barrel; May 19th, 1880, 25 barrels at the same, and May 28th, 1880, 100 barrels at \$5.50 per barrel.

The evidence consisted entirely of the correspondence between the parties, and the testimony of appellee as to the market value of flour in the city of New York during the

Brown v. Norton.

months of January, February, March, April and May of the year 1880, which showed, as based upon prices current sent by appellants to appellee weekly, the prices to be for the month of January, from \$6.50 to \$7; for the months of February and March, from \$6.25 to \$6.75; and did not fall to \$5.50 and \$5.75 until the 1st of May.

Upon the preponderance of this evidence the amount of the damages assessed on appellee's counter-claim may appear to be slightly excessive. But the evidence clearly tends to support the verdict. And according to the well established line of decisions of this court, the verdict of the jury, in such cases, will not be disturbed by weighing the evidence.

There is no available error in overruling the motion for a new trial. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

No. 9449.

BROWN v. NORTON.

SUPREME COURT.—*Evidence.*—*Verdict.*—*Account.*—*Set-Off.*—Where, on the trial of an action upon an account, to which a set-off is pleaded, the evidence is conflicting, and a verdict is returned disallowing the account, and for the defendant for the amount of his set-off, the Supreme Court will not disturb it.

From the Laporte Circuit Court.

J. A. Love, J. Bradley and J. H. Bradley, for appellant.

L. A. Cole, for appellee.

BLACK, C.—The appellee, who was the defendant, recovered judgment against the appellant, who was the plaintiff, in an action commenced before a justice of the peace.

The complaint consisted of an account of two items, one for two heifers, at twenty dollars each, and the other for certain

Brown v. Norton.

services rendered and money paid at the appellee's request, amounting to twenty-five dollars.

The appellee pleaded, by way of set-off, two claims against the appellant, one for nineteen dollars and fifty cents, based upon a common-law award, and the other for thirty-seven dollars expended by the appellee in the payment of taxes upon certain real estate which had been conveyed and warranted in the statutory form by the appellant and his wife to the wife of the appellee, said taxes being a lien thereon at the time of the conveyance, and the appellant having promised to repay the amount so expended.

There was a verdict for the appellee, for fifty-six dollars and fifty cents, the full amount of his claims, the appellant's account being wholly disallowed.

The only question discussed by counsel is that involved in the action of the court in overruling a motion for a new trial, and of the reasons assigned for a new trial the only one urged here is, that the verdict is not sustained by sufficient evidence.

As to the second item of the appellant's account, that for services rendered and money paid, the testimony is conflicting, and therefore this court can not disturb the conclusion of the jury concerning it.

The sale and delivery of the cattle mentioned in the first item, and the price claimed for them, were clearly established, and the jury could not have found otherwise. There was some testimony tending to prove that the cattle were sold on credit, and that payment was not yet due. They were sold by the agent of the appellant to the appellee, at an auction, by the terms of which time was given for a period which had not yet expired. Whether by special agreement there was a modification of these terms in this regard, except one which was dependent upon the happening of an event which failed, does not clearly appear from the testimony, which is set out in narrative form. Certainly the jury found that the debt was not due, and it would be a usurpation of the jury's province for us to determine otherwise.

Eigemann v. Board of Commissioners of Posey County.

The evidence showed that the appellee was entitled to recover nineteen dollars and fifty cents upon the award pleaded, and as the motion for a new trial did not question the amount of the recovery, it is unnecessary for us to determine whether the evidence tended to establish his right to recover a larger amount.

The judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the costs of the appellant.

No. 9233.

EIGEMANN v. BOARD OF COMMISSIONERS OF POSEY COUNTY.

CONTRACT.—*Extra Work*.---*Evidence*.—Where, by the terms of a building contract, extra work is to be estimated in proportion to the contract price of the entire work, evidence of the reasonable value of the extra work is not admissible.

SAME.—*County Commissioners*.—*County Building*.—*Individual Action*.—The authority of a board of county commissioners, for the doing of extra work to an amount exceeding \$500, in the construction of a county jail, under a contract with plans and specifications, can not be shown by proving the separate individual assent of the members of the board.

SAME.---*Ratification*.—*Mistake*.—It is not competent to show a ratification by the board of commissioners of extra work done under a contract for the building of a jail, by proof that the disputed items were omitted by mistake from the architect's report to the board of extra work, the board having approved some and rejected others of the items so reported.

From the Vanderburgh Circuit Court.

C. A. DeBruler, E. R. Hatfield and H. C. Pitcher, for appellant.

E. M. Spencer, A. P. Hovey and G. V. Menzies, for appellee.

WOODS, J.—The appellant applied to the board of commis-

Eigemann v. Board of Commissioners of Posey County.

sioners for an allowance in payment for extra work done in the construction of the jail and sheriff's residence at Mount Vernon, in said county. The board rejected the claim; the case, on appeal to the circuit court, was taken, by a change of venue, to the court below, in which the appellant obtained judgment for a small sum, not disputed, the evidence of the remainder of his claim having been excluded by the court.

The contract between the parties was reduced to writing, and contains this stipulation, to wit:

"The party of the first part reserve to themselves the right to make such alterations, additions or omissions to said plans as they may deem necessary and proper, and in case such alterations shall be required of the party of the second part, then the additional costs so incurred to be estimated and paid for in the proportion such work may bear to the original contract prices, and as certified to by said architects."

The printed specifications, which are made a part of the contract, contain the following provision:

"If any change is made in the design or details of the building, by the commissioners or their representative, the superintending architect, the same shall not invalidate a contract, but a certificate of the same shall be entered by said superintending architect and put on file at the auditor's office, stating at the same time the difference, more or less, from the contract sum, caused by the change."

Also the following: "The architect to be at liberty, by the direction and order of the board of commissioners, to make any deviation from, or alteration in, the plan, form, construction, detail and execution described by the drawings and specifications, without invalidating or rendering void the contract, and, in case of any difference in the expense, an addition to or abatement from said contract amount shall be made in the ratio or proportion such works may bear to the whole contract works agreed to be performed, and the same to be determined by the architect, but no extra or addition to be admitted or allowed for unless executed under his written authority,

Eigemann v. Board of Commissioners of Posey County.

and a statement and amount of claim to be made weekly for the architect's decision thereon. The architect's decision, opinion, certificate, report and decision on all matters to be binding and conclusive."

The first cause stated in the motion for a new trial is, "That the court erred in refusing to permit the plaintiff to prove by the witness, * * that items charged in the plaintiff's bill of particulars * * were for extra work and labor done and material furnished by the plaintiff in the building, etc., outside the requirements of the contract for the building of the same, and that all of said extra work was done with the knowledge and by the authority of the supervising architect and superintendent of construction, and with the knowledge and acquiescence of the individual members of the board of commissioners of Posey county, and that all of said work was done in a good and workmanlike manner, and the prices charged therefor * * reasonable."

Irrespective of the merits of the general question to which the arguments of counsel have, in the main, been addressed, the ruling of the court was, for manifest reasons, technically right.

It was not offered to prove that the architect gave any written order for the extra work, nor that the weekly statements, required by the specifications to be made for the architect's decision thereon, had been made, nor was it offered to show the cost or value of the extra work according to the rule fixed by the contract, that is, "in the ratio or proportion the extra work" bore "to the entire work," or "to the original contract prices." The offer to prove the reasonable value was, under the contract, irrelevant and incompetent.

The stronger and more satisfactory ground for upholding the decision of the circuit court, however, is, that, without the direction and order of the board, the architect had no authority to make or permit any alterations or additions in the plans of the work, and that it was incompetent to show that the changes, which were made, were made with the knowledge and acquiescence of the individual members of the board. The

Eigemann v. Board of Commissioners of Posey County.

individual action or acquiescence of the commissioners was, as the appellant had agreed and was bound to know, as meaningless and ineffective as the action of any other citizens would have been. It was not offered to show that the extra work was done with the joint approval of the individual members of the board acting together. So that the question, what would have been the effect of such action, is not presented. The averment of individual acquiescence of the members, if it does not import the separate act of the members, certainly can not be construed to mean their joint official action. The intendments are against the pleader.

By force of the act of December 23d, 1872, 1 R. S. 1876, p. 374, the commissioners were forbidden to contract for the building of a jail or other structure, to cost more than \$500, until a plan and specifications had been adopted and filed in the office of the county auditor, and until they had advertised the letting, and were then required to let the same to the lowest bidder, and to take of him bond and security for the performance of the work according to the plans and specifications so filed.

Whether under the provisions of this law it was in the power of the commissioners to authorize or require alterations which involved a difference of more than \$500, in the cost of the building (the claim of the appellant for extra work exceeds \$10,000), we do not find it necessary to decide. It is clear upon the evidence adduced and the facts offered to be proved that no attempt was made on the part of the commissioners as a board to give official sanction to the additions in question, and on the part of the appellant there was no effort to comply, in respect to the matters in dispute, with the explicit requirements of his contract.

In his final report to the board, made after the completion of the building, the architect made a statement of extra work done by the appellant, reporting some of the items as done on the authority of the architect, and others without his objection. Thereupon the board ordered the payment of speci-

Smelser v. The Wayne and Union Straight Line Turnpike Company.

fied items and rejected the others. On the trial, the appellant offered to prove that by mistake the architect omitted from this report certain items of extra work; the court excluded the evidence and counsel argue that this was error. They say: "Clearly the board ratified the acts of the architect in ordering the work to be done. They failed to pay for it simply because it was omitted from the architect's report."

The reasoning seems to us to be without force. Assuming, without conceding, that the board lawfully allowed what it did allow, and might lawfully have allowed for the omitted items, if they had been included in the report, the inference is not warranted either in law or logic that they would have allowed the omitted items because they did allow some of those which were reported. There is perhaps better reason for the opposite inference. There is certainly no ground for saying that, by accepting some of the items of the report and rejecting others, they thereby ratified things not mentioned in the report. If by doing the work, under the direction of the architect, with the knowledge and acquiescence of the individual commissioners, the appellant did not acquire a right to compensation from the county, as we have already decided he did not, his claim could not be made better by proving the failure of the architect by mistake to make mention of it in a particular report in which other like items were embraced.

Judgment affirmed, with costs.

No. 8405.

SMELSER v. THE WAYNE AND UNION STRAIGHT LINE
TURNPIKE COMPANY.

CORPORATIONS.—Contract.—Estoppel.—A party who so contracts with a body acting as a corporation, as by implication to recognize the fact of its corporate existence, is estopped to question it collaterally, when sued upon the contract.

VOL. 82.—27

82	417
131	7
82	417
143	70
82	417
164	456
82	417
167	591

Smelser v. The Wayne and Union Straight Line Turnpike Company.

PROMISSORY NOTE.—*Complaint.*—*Evidence.*—*Variance.*—*Endorsement.*—*Consideration.*—*Title.*—A complaint upon a promissory note alleged to have been made to A., and by him assigned by endorsement to the plaintiff, is not supported by proof that A. was the agent of the plaintiff and as such took the note in his own name for the plaintiff upon a consideration moving from the latter.

PRACTICE.—*Pleading.*—*Proof.*—When there are several paragraphs of answer, some in confession and others in denial, the plaintiff can not treat those in confession as dispensing with the proof of facts put in issue by the paragraphs in denial.

From the Wayne Circuit Court.

I. B. Morris and *H. U. Johnson*, for appellant.

W. A. Bickle, for appellee.

ELLIOTT, J.—No question arises upon the pleadings. The argument of counsel is confined to the questions arising upon the ruling refusing a new trial. Without stating at length the pleadings, which are very voluminous, because of the great and needless particularity with which the appellant stated his matters of defence, we outline the important matters alleged by the contestants. The complaint was in three paragraphs; the answer in nine. The first paragraph of the complaint was upon a promissory note; the second and third sought a recovery for toll alleged to be due from the appellant. One of the paragraphs of the answer was a general denial; another a plea of *nul tiel* corporation, and others set up, at great length, facts showing that the appellee was not a legally organized and existing corporation.

The appellant's theory is, that there was no such corporation as the appellee, and that the finding of the court was, therefore, contrary both to the law and the evidence. The evidence shows an attempt to incorporate under the laws of the State, the exercise of corporate functions, and the assertion of corporate existence, and shows also that the appellant contracted with it as a corporation. He is not now in a situation to deny its corporate existence. *Baker v. Neff*, 73 Ind. 68; *Snyder v. Studebaker*, 19 Ind. 462. The question as to whether there was or was not a right to exercise corporate

Smelser v. The Wayne and Union Straight Line Turnpike Company.

powers, is a question to be litigated in a direct proceeding, and not in this collateral manner. *Mullikin v. City of Bloomington*, 72 Ind. 161.

The evidence shows a contract to pay the toll. It is not necessary that there should be an express contract directly recognizing corporate existence; it will be sufficient if the acknowledgment is fairly implied from the contracts and the course of dealing between the parties. A person who deals with an association claiming to be a corporation, and in so doing recognizes its corporate existence, can not escape liability by denying that there was any such corporation.

The case of *Newton County Draining Co. v. Nofsinger*, 43 Ind. 566, does not sustain appellant's position. That case can not be treated as deciding anything more than that injunction will lie where persons, having no corporate rights, threaten to do, and unless restrained will do, irreparable injury to the lands of the complainant, upon the ground and claim that they are incorporated. It carries, even when allowed this effect, the doctrine to the very verge of the law, and can not be extended. That case, however, is very different from the present, for there the object of the proceeding was to prevent injury to property; here it is to prevent the recovery upon a contract, the consideration of which has been received and enjoyed by the party resisting the recovery.

The case of *Moore v. State, ex rel.*, 71 Ind. 478, settles the question as to the corporate character of the appellee. It was there held not only that the appellee was a corporation *de facto* at the time covered by this litigation, but also that, by a curative statute subsequently enacted, its organization and existence were legalized. We are not required to decide whether the curative statute affected contracts made prior to its enactment. The corporation was one which might have been created under existing laws, and the appellant, by his contract and course of dealing with it, estopped himself to deny its corporate existence. As to him, at least, it was a corporation from the time he dealt with it as such.

Smelser v. The Wayne and Union Straight Line Turnpike Company.

The trial court rightly held that appellant was estopped to question appellee's corporate existence, and we should have no hesitation at all in affirming the judgment, if any title had been shown to the note upon which the first paragraph of the complaint is based.

The complaint avers that the note was executed to Jacob S. Moore, and by him assigned to appellee, "by his written endorsement on the back thereof." It is settled that it is incumbent upon a plaintiff to prove the endorsement as alleged in his complaint. *Jackson T'p v. Barnes*, 55 Ind. 136; *Wallace v. Reed*, 70 Ind. 263; *Morgan v. Smith, etc., Co.*, 73 Ind. 179.

In a very able and ingenious brief, counsel for appellee contends that the case in hand is not within the rule, for the reason that the evidence shows that Moore, the payee, was the agent of the corporation, and that, as such, he received the note. It is no doubt true that the principal may sue upon a note in fact belonging to him, although written payable to the agent. *Nave v. Hadley*, 74 Ind. 155. This rule avails the appellee nothing, for the reason that the complaint does not proceed upon the theory that the note belongs to the corporation because executed to its agent. On the contrary, the title is explicitly alleged to have been acquired by endorsement from a stranger, and this prohibits a recovery upon the ground that the appellee was, in fact, the real owner. A plaintiff can not lay one species of title and recover upon an altogether different one.

It is claimed that the appellee was not bound to prove title, because one paragraph of the answer expressly admitted it. If this paragraph stood alone, or if there were no others putting the appellee upon proof of title, then it would have been unnecessary to have given the endorsement in evidence. *White v. Smith*, 46 N. Y. 418; *Colter v. Calloway*, 68 Ind. 219; *New Albany, etc., Co. v. Stallcup*, 62 Ind. 345. But there were other paragraphs denying all the material allegations of the complaint, and appellee was, therefore, put to the proof of title as laid. Where there are several paragraphs of answer,

 Bitting v. Ten Eyck.

some in confession and others in denial, the plaintiff can not treat those in confession as dispensing with the proof of facts put in issue by the paragraphs in denial. *Wheeler v. Robb*, 1 Blackf. 330 (12 Am. Dec. 245); *Arnold v. Sturges*, 5 Blackf. 256; *Ricket v. Stanley*, 6 Blackf. 169; *Bean v. Keen*, 7 Blackf. 152.

We are compelled to reverse the judgment, upon the ground that the record does not show that the endorsement of the note sued on was given in evidence.

Judgment reversed, with costs.

No. 8708.

BITTING v. TEN EYCK.

MALICIOUS PROSECUTION.—*Probable Cause.*—*Evidence.*—*Instruction.*—An acquittal of a criminal charge is not evidence of the want of probable cause for the prosecution, and it is not error in a suit for malicious prosecution to refuse to instruct that a verdict acquitting the plaintiff of a criminal charge is *prima facie* evidence of his innocence.

SAME.—*Intruding Province of Jury by Instruction.*—An instruction to the jury, in such a suit, that it appears there were two such suits (forcible entry and detainer), one criminal and the other civil; both were undertaken, it would appear, on the theory that B. (the plaintiff) was wrongfully and forcibly detaining from the defendant fifteen acres of land,—is erroneous, inasmuch as it states an inference from the evidence, which it was the province of the jury and not the court to draw.

SAME.—*Practice.*—It is error to give inconsistent instructions to the jury.

SUPREME COURT.—*Rehearing.*—Where a party, in the Supreme Court, having had abundant time, makes no argument until after the opinion is filed, a petition for a rehearing, merely objecting to the record and asking a decision of matters which he claims were overlooked by the court, will not be considered.

From the Carroll Circuit Court.

M. Jones, J. L. Miller, W. F. Severson, J. R. Coffroth and T. A. Stuart, for appellant.

J. M. LaRue and F. B. Everett, for appellee.

88	421
126	214
137	474
82	421
138	157
82	421
144	195
88	421
149	134
82	421
155	55

Bitting v. Ten Eyck.

BICKNELL, C. C.—This was a suit by the appellant against the appellee for malicious prosecution.

It was commenced in the superior court of the county of Tippecanoe, and tried in the Carroll Circuit Court.

There are ten paragraphs in the complaint, each of them representing a separate cause of action, except the first and second paragraphs, which are for the same prosecution. The complaint, therefore, contains nine distinct causes of action, for which the aggregate damages claimed are \$30,000.

The first and second, and the third, fourth and fifth paragraphs charge prosecutions, malicious and without probable cause, for forgery. The first and second aver the conviction of the appellant, and his sentence to the State's prison for two years, the reversal of the judgment, and the final acquittal of the appellant. The third, fourth and fifth paragraphs allege the acquittal of the appellant in each case.

The sixth, seventh and eighth paragraphs charge separate prosecutions, malicious and without probable cause, for perjury, and the acquittal of the appellant in each case.

The ninth and tenth paragraphs charge like prosecutions for forcible entry and detainer, and the acquittal of the appellant in each of these cases.

Demurrers to each of said paragraphs for want of facts, etc., were overruled. A motion to strike out part of the complaint was sustained. The appellee answered by a general denial, and the issues were tried by a jury, who found for the defendant, the appellee. A motion for a new trial, and a motion in arrest of judgment, were overruled; judgment was rendered upon the verdict. The appellant assigns for error the overruling of the motion for a new trial.

Among the reasons for a new trial are the following:

The court erred in refusing to give to the jury, at the request of the plaintiff, instructions Nos. 14, 15 and 17, and in giving to the jury, at the request of the defendant, instructions Nos. 1, 2, 3, 4, 5, 6, 8, 10½, 12½, 14, 20, 21, 18, 19½ and

Bitting v. Ten Eyck.

19, and in giving to the jury, of its own motion, instructions Nos. 1, 2, 3, 4, 5 and 6.

To recover in a case of this kind, the plaintiff must show that the defendant instigated the prosecution maliciously and without probable cause, and that the prosecution was ended before suit brought.

To show that the defendant instigated the prosecution, it may be proved that he employed counsel therefor, or gave instructions, or paid expenses, or procured witnesses, or stated that he had put the plaintiff in the penitentiary, or that the defendant was in any way active in forwarding the suit.

The end of the prosecution is generally shown by the acquittal of the plaintiff. To prove malice, it must be shown that the charge was wilfully false. Any unlawful act, done wilfully and purposely to the injury of another, is, as against him, malicious. Malice may be implied from circumstances, such as the defendant's conduct and his declarations, and his forwardness and activity in publishing the proceedings. Proof that the defendant never sincerely believed the plaintiff guilty of the charge for which he was prosecuted, tends to show malice in the defendant, and malice may be inferred by the jury from the want of probable cause.

But want of probable cause can not be inferred from malice proved. There may be malice, and also probable cause, and in that case the action for malicious prosecution can not be maintained. Probable cause is conduct of the accused tending to show that the prosecution was undertaken from public motives, or such facts as would induce a reasonable man to commence a prosecution, or circumstances sufficient to warrant a prudent man in the belief that the party is guilty, or such a state of facts as would lead a man of ordinary caution and prudence to entertain a belief of the guilt, but a mere suspicion, or even an honest belief of the guilt, without facts to support it, does not show probable cause. *Graeter v. Williams*, 55 Ind. 461.

If the defendant can show such facts as would induce a rea-

Bitting v. Ten Eyck.

sonable and prudent man to believe the plaintiff guilty, then he is not liable for malicious prosecution, whatever may have been his own personal malice, provided it be made to appear that the defendant had knowledge of such facts when he instituted the prosecution. *Galloway v. Stewart*, 49 Ind. 156 (19 Am. R. 677). The conviction of the plaintiff is always evidence of probable cause, unless it was obtained chiefly or wholly by the false testimony of the defendant; generally, it is conclusive evidence of probable cause. *Parker v. Farley*, 10 Cush. 279; *Parker v. Huntington*, 2 Gray, 124. And it has been held sufficient evidence of probable cause to show that the plaintiff was convicted of the offence before a justice of the peace who had jurisdiction, although he was afterwards acquitted on an appeal. *Whitney v. Peckham*, 15 Mass. 243; *Griffis v. Sellars*, 2 Dev. & Bat. 492. But, where the defendant in a criminal prosecution was found guilty and a new trial was granted by the same court, and subsequently a *nolle prosequi* was duly entered, and the defendant was thereupon discharged, it was held that the finding of guilty, having been set aside, was no evidence of probable cause. *Richter v. Koster*, 45 Ind. 440. But an acquittal does not tend to show want of probable cause; there may have been ample cause, notwithstanding the acquittal. Upon the application of the foregoing principles to the instructions asked for by the appellant and refused by the court, it follows that there was no error in refusing instructions Nos. 14 and 15; of these, the former asserted that "the acquittal and discharge of the appellant were *prima facie* evidence that the prosecutions were begun without probable cause;" the latter asserted that "the verdict of the jury acquitting the appellant was *prima facie* evidence that he was innocent of the charge." Instruction No. 17, asked for by appellant and refused by the court, was substantially given in No. 1 of the instructions given by the court of its own motion.

Instruction No. 14, given by the court at the request of the appellee, begins as follows: "As to the forcible entry and detainer proceedings, it appears that there were two such suits;

Bitting v. Ten Eyck.

one was in the nature of a criminal, and the other a civil, suit; both were undertaken, it would appear, upon the theory that Bitting was wrongfully and forcibly detaining from him, Ten Eyck, this fifteen acres of land."

The court had no right to assume that the prosecutions were undertaken upon a certain theory, and then tell the jury what that theory was; the theory of the prosecutions embraced the motive thereof. The appellant in his complaint had charged that the prosecutions were malicious and without probable cause. This the appellee had denied. It was the duty of the jury to determine whether the prosecutions were malicious and without probable cause or not, and when the court assumed that the prosecutions were founded on a certain theory, and told the jury that theory, on which, in the opinion of the court, the prosecutions were based, the court was making an inference from the testimony. It was the business of the jury to do that, and to determine for themselves what the theory or motive of the prosecutions was. The court erred in giving to the jury charge No. 14 asked for by the appellee.

In No. 21 of the instructions given to the jury at the request of the appellee, the court told the jury that "the mere employment of counsel by Ten Eyck to assist in the prosecution against Bitting is not evidence of malice." The court also told the jury in No. 1 of the instructions given by the court of its own motion, that "for the purpose of determining whether or not the prosecutions complained of, or some of them, were malicious, it is proper for you to take into consideration whether or not Ten Eyck employed counsel to aid in the prosecution."

These two instructions contradict each other. In *Somers v. Pumphrey*, 24 Ind. 231, it was held that it is error for the court to give to the jury instructions which are inconsistent with each other, and which leave the jury in doubt which to believe. There is no substantial error in the remainder of the instructions complained of. As the judgment must be reversed for the errors already pointed out, it is not neces-

 Binford v. Johnston.

sary to consider the other reasons alleged for a new trial. The judgment of the court below ought to be reversed and a new trial awarded.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee, and this cause is remanded for a new trial.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—After the appellee joined in error on the record, this cause was pending here for a year and ten months. In all that time the appellee filed no brief. He now files a petition for a rehearing for the purpose of objecting to the record, and obtaining a decision of certain matters which he claims were overlooked by the court.

The petition for a rehearing ought to be overruled on the authority of *Board of Commissioners, etc., v. Hall*, 70 Ind. 469, and cases there cited; and *Porter v. Choen*, 60 Ind. 338.

PER CURIAM.—The petition for a rehearing is overruled.

89	434
126	130
82	426
138	606
82	426
140	243
82	426
d153	20

 No. 9348.

BINFORD v. JOHNSTON.

NEGLIGENCE.—*Injury from Toy Pistol.—Pleading.—Instructions.—Variance.—*

Evidence.—The complaint alleged that the defendant sold to two sons of the plaintiff, aged ten and twelve years, cartridges loaded with powder and ball, for use in a toy pistol, and instructed the boys in their use, well knowing the dangerous character thereof, and that they were too young to be trusted with such articles; that the boys left the toy pistol loaded with one of the cartridges on the floor of their home, where a younger brother, aged six years, picked it up and discharged it, the ball inflicting a wound on one of the other boys from which he died; that the plaintiff expended large sums in an endeavor to cure the wounded boy, lost his services and society, etc.

Held, that the complaint was good on demurrer.

82	426
169	576

Binford v. Johnston.

Held, also, that the sale of the cartridges, being in violation of the criminal law, was of itself an act of negligence by the defendant, and the court might properly so instruct as a conclusion of law.

Held, also, that if the evidence disclosed that the sale was made to one instead of both the lads as alleged, the variance was immaterial.

SAME.—Intervening Agency.—Remote Damages.—A person who places in the hands of a child an article of a dangerous character and one likely to do injury to the child itself or others, is guilty of an actionable wrong; and, where injury results, the fact that some agency intervenes between the original wrong and the injury does not preclude a recovery if the injury was the natural or probable result of the original wrong.

SAME.—Sale of Dangerous Explosives.—One who sells dangerous explosives to a child, knowing that they are to be used in such a manner as to put in jeopardy the lives of others, must be taken to contemplate the probable consequences of his wrongful act, and a probable consequence of such sale is that the buyers or their associates will be injured thereby.

From the Montgomery Circuit Court.

M. W. Bruner, for appellant.

J. E. Humphries, for appellee.

ELLIOTT, J.—The case made by the appellee's complaint, briefly stated, is this: Two sons of appellee, Allen and Todd, aged twelve and ten years respectively, bought of the appellant, a dealer in such articles, pistol cartridges loaded with powder and ball. The boys purchased the cartridges for use in a toy pistol, and were instructed by appellant how to make use of them in this pistol; the appellant knew the dangerous character of the cartridges, knew the hazard of using them as the boys proposed, and that the lads were unfit to be entrusted with articles of such a character; shortly after the sale, the toy pistol, loaded with one of the cartridges, was left by Allen and Todd lying on the floor of their home. It was picked up by their brother Bertie, who was six years of age, and discharged, the ball striking Todd and inflicting a wound from which he died.

A man who places in the hands of a child an article of a dangerous character and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong. If a dealer should sell to a child dynamite, or other explosives of

Binford v. Johnston.

a similar character, nobody would doubt that he had committed a wrong for which he should answer, in case injury resulted. So, if a druggist should sell to a child a deadly drug, likely to cause harm to the child or injury to others, he would certainly be liable to an action.

The more difficult question is whether the result is so remote from the original wrong as to bring the case within the operation of the maxim '*causa proxima, et non remota, spectatur*'. It is not easy to assign limits to this rule, nor to lay down any general test which will enable courts to determine when a case is within or without the rule. It is true that general formulas have been frequently stated, but these have carried us but little, if any, beyond the meaning conveyed by the words of the maxim itself. |

The fact that some agency intervenes between the original wrong and the injury does not necessarily bring the case within the rule; on the contrary, it is firmly settled that the intervention of a third person or of other and new direct causes does not preclude a recovery if the injury was the natural or probable result of the original wrong. *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166 (40 Am. R. 230). This doctrine remounts to the famous case of *Scott v. Shepherd*, 2 W. Black. 892, commonly known as the "Squib case." The rule goes so far as to hold that the original wrong-doer is responsible, even though the agency of a second wrong-doer intervened. This doctrine is enforced with great power by COCKBURN, C. J., in *Clark v. Chambers*, 7 Cent. L. J. 11; and is approved by the text-writers. Cooley Torts, 70; Addison Torts, section 12. }

Although the act of the lad Bertie intervened between the original wrong and the injury, we can not deny a recovery if we find that the injury was the natural or probable result of appellant's original wrong. In *Henry v. Southern Pacific R. R. Co.*, 50 Cal. 176, it was said: "A long series of judicial decisions has defined proximate, or immediate and direct damages to be the ordinary and natural results of the negligence;

Binford v. Johnston.

such as are usual and as, therefore, might have been expected." Lord ELLENBOROUGH said in *Townsend v. Watson*, 9 East, 277, that "Every man must be taken to contemplate the probable consequences of the act he does." In *Billman v. Indianapolis, etc., R. R. Co.*, *supra*, very many cases are cited declaring and enforcing this doctrine, and we deem it unnecessary to here repeat the citations. Under the rule declared in the cases referred to, it is clear that one who sells dangerous explosives to a child, knowing that they are to be used in such a manner as to put in jeopardy the lives of others, must be taken to contemplate the probable consequences of his wrongful act. It is a probable consequence of such a sale as that charged against appellant, that the explosives may be so used by children, among whom it is natural to expect that they will be taken, as to injure the buyers or their associates. A strong illustration of the principle here affirmed is afforded by the case of *Dixon v. Bell*, 5 M. & S. 198. In that case the defendant sent a child for a loaded gun, desiring that the person who was to deliver it should take out the priming. This was done; but the gun was discharged by the imprudent act of the child, the plaintiff injured, and it was held that the defendant was liable. In *Lynch v. Nurdin*, 1 Q. B. 29, the doctrine of the case cited was approved, and the same judgment has been pronounced upon it by other courts as well as by the text-writers. *Carter v. Towne*, 98 Mass. 567; *Wharton Neg.* 851; *Shearman & Redf. Neg.*, 3d ed., 596.

There is no such contributory negligence disclosed as will defeat a recovery. The age of the lads who bought the cartridges, the use the appellant knew they intended to make of them, and the fact that they did use them as instructed by him, are all important matters for consideration upon the question of contributory negligence. There are very many cases holding that the age of the child is always to be taken into account, and that what would be negligence in an adult will not be negligence in a young lad. The Supreme Court of the United

Binford v. Johnston.

States thus states the rule: "The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." *Railroad Co. v. Stout*, 17 Wal. 657. It must be the law, in cases of this nature, that the age of the child shall be considered, or it must follow that a vendor of the most dangerous explosives may sell them as freely to young children as to men of mature years, and this surely would be a result which no reasonable man would undertake to support. In *Potter v. Faulkner*, 1 Best & S. 800, ERLE, C. J., said: "The law of England, in its care for human life, requires consummate caution in the person who deals with dangerous weapons;" and we think it may with equal truth be said that the common law both of England and America requires of him who deals with dangerous explosives to refrain from placing them in the hands of children of tender age. If the child is too young to know the character of the thing sold him, it is the business of the dealer to refuse to sell him articles likely to put in jeopardy his own or some other person's life. Where one sells another a dangerous instrument, and that other is ignorant of its true character, and this the seller knows, he is responsible for injuries resulting from the negligent use of the instrument. There are many well reasoned cases which, carrying the doctrine still further, hold that one who places a dangerous thing in a position where it is likely to cause injuries to others, is liable to a child who is injured, although he may be a trespasser. *Bird v. Holbrook*, 4 Bing. 628; *State v. Moore*, 31 Conn. 479; *Birge v. Gardner*, 19 Conn. 507; *Lynch v. Nurdin*, *supra*; *Kerr v. Forgue*, 54 Ill. 482; *Keffe v. Milwaukee, etc., R. W. Co.*, 21 Minn. 207 (18 Am. R. 393); *Railroad Co. v. Stout*, *supra*. The case in judgment does not require us to carry the rule to the extent to which it is carried in the cases cited. Here, the appellant, with full knowledge of the character of the cartridges, and fully informed as to the use the lads intended to make of them, placed these dangerous instruments in their hands, and he can not now escape liability, upon

 Binford v. Johnston.

the ground that the boys had no right to buy or use such articles. Nor can he escape upon the ground that the loaded pistol was left lying where the young child, Bertie, could reach it. One who deals with children must anticipate the ordinary behavior of children. The appellant was bound to take notice of the natural conduct of lads like those to whom he sold the cartridges, and it can not be justly said that the act of the lads in carrying the pistol with them to their home, and leaving it upon the floor within reach of their brother and playmate, was an unnatural or improbable one. /

It is contended that the complaint is bad because it does not state who were the next of kin of the deceased, Todd Johnston, and we are referred to *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297, 304; *Pittsburgh, etc., R. W. Co. v. Vining's Adm'r*, 27 Ind. 513; *Indianapolis, etc., R. R. Co. v. Keeley's Adm'r*, 23 Ind. 133; *Gann v. Worman*, 69 Ind. 458. We do not think these cases support the attack upon this complaint. It is in two paragraphs and the demurrer is to the entire complaint, so that if one is good the demurrer is not well taken. In the second paragraph it is explicitly set forth that the appellee was the father of the deceased; that he expended money, and rendered services, in endeavoring to secure a cure of his son; that he lost his services and society from the time he was wounded until his death. These allegations bring the case within the rule that money expended in the effort to cure a wound wrongfully caused by the act of another may be recovered. *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297; *Cooley Torts*, 262. The right of action for the death is a statutory one and is distinct and different from the personal right in the father recognized by the common law. The complaint shows a right to some relief and this gives it sufficient strength to withstand a demurrer. *Bayless v. Glenn*, 72 Ind. 5.

/ Additional strength is added to one, at least, of the paragraphs of the complaint by the facts stated in it, showing that the cartridges were sold in violation of an express statute of

Binford v. Johnston.

the State. By an act passed in 1875, and incorporated in the revision of 1881 as section 1986, it is made a misdemeanor to "sell, barter, or give to any other person under the age of twenty-one years any * cartridges manufactured and designed for use in a pistol." In placing the cartridges in the hands of the lads, Allen and Todd, the appellant did an unlawful act, and under settled principles is liable for the consequences naturally and proximately resulting from his unlawful act. In *Weick v. Lander*, 75 Ill. 93, it is held that, "where an act unlawful in itself is done, from which an injury may reasonably and naturally be expected to result, the injury, when it occurs, will be traced back and visited upon the original wrong-doer." In the course of the opinion and as a commentary upon cases reviewed, it is said: "The principle announced is, that whoever does an unlawful act is to be regarded as the doer of all that follows." The decision in the case cited is well sustained; it finds support from the cases heretofore cited as well as from the following and many others: *Greenland v. Chaplin*, 5 Exch. 243; *Powell v. Deveney*, 3 Cush. 300; *Sheridan v. Brooklyn, etc., R. R. Co.*, 36 N. Y. 39; *Griggs v. Fleckenstein*, 14 Minn. 81; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Farrant v. Barnes*, 11 C. B. (N. S.) 553.✓

Appellant attacks one only of the instructions given by the court. The instruction assailed reads thus: "I instruct you that a sale of cartridges, in violation of a criminal statute of the State, would be of itself an act of negligence, and if you find from the evidence in this case that the defendant sold the cartridges as alleged in the complaint, such sale is an act of negligence on his part, and you will have no further trouble on this point." The sole objection stated is, that the court had no right to declare that the sale of the cartridges in violation of law was an act of negligence. The only case cited in support of appellant's position is the case of *Weick v. Lander*, from which we have quoted, and it makes against

Binford v. Johnston.

rather than for appellant. Where a party does an act in direct violation of a positive statute, the court is justified in characterizing it as an act of negligence. It is in general true, that negligence is a question of fact, but this is not universally true. Judge Cooley has examined this question, and with ability and vigor discussed it. In the course of the discussion, he says many cases clearly present mere questions of law, and that "Such are the cases of a disregard of a law expressly devised to prevent the like injuries. An instance is that of the failure of a railway train to come to a stop before crossing another road, as is required by the statute in some States, whereby another train is run into. Here the negligence is plain, but it might happen that some parties injured by it would, by their own negligence, be precluded from any redress. The case might be equally clear if the railway company were to send out a train without brakes, and thereby an injury should result through the impossibility of stopping it when a danger appeared; or if one were to set a bonfire in a town while a fierce wind was raging; * or if he were to send a package of dynamite by express without disclosing its dangerous nature. Concerning such cases no one should be in doubt." Cooley Torts, 670. The principle that the court may, as matter of law, instruct the jury that an act constitutes negligence, is illustrated by many cases in our own reports. Thus, it has often been held that it is the duty of the court to instruct the jury that it is negligence for a corporation to make a dangerous excavation in a public street, and leave it unguarded. So, in relation to the duties of a railroad corporation, the court often declares to the jury what act will constitute negligence, and this holds good of instructions upon the subject of persons attempting to cross railroad tracks. But, without prolonging this opinion, we refer without comment to the cases of *Railroad Co. v. Stout*, 17 Wal. 657; *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134);

VOL. 82.—28

Binford v. Johnston.

Pittsburgh, etc., R. R. Co. v. Williams, 74 Ind. 462; *Louisville, etc., R. W. Co. v. Richardson*, 66 Ind. 43 (32 Am. R. 94). It must not be left out of mind that the instruction does not affirm that there may be a recovery, but simply declares that it is negligence for a person to voluntarily do an act in direct violation of a statute. In a case where there is evidence tending to show some excuse for doing an act prohibited by statute, it might, perhaps, be necessary to qualify the instruction, but there was here no such evidence. And, it is to be remarked, the instruction refers, when taken, as it must be, as an entirety, to such a sale as that charged in the complaint, thus limiting the general proposition to the particular case.

The appellant asked the court to instruct the jury, that if the sale was to Todd Johnston, and not to him and his brother jointly, there could be no recovery. We think this instruction was properly refused. It was sufficient for the appellee to sustain the substance of the issue tendered by him. It was not material whether the boys joined in buying the cartridges; if the sale was to one of them, it was an actionable wrong. Judgments can not be reversed for an immaterial variance; it is only where the issue in its general scope is not sustained, that a reversal will be adjudged. R. S. 1881, sec. 393.

Instructions numbered ten and fifteen, asked by the appellant, are substantially the same, and, as the former was given by the court, it was proper to refuse the latter. It is not error to refuse an instruction when another embodying the same matter has been given.

The other questions presented upon the instructions are disposed of in our discussion of the sufficiency of the complaint.

Judgment affirmed.

The Indianapolis and Vincennes Railroad Company v. McLin.

No. 9097.

THE INDIANAPOLIS AND VINCENNES RAILROAD COMPANY v. McLIN.

DEMURRER TO EVIDENCE.—Practice.—The practice in this State requires the party demurring to evidence to set it out and to admit all the facts which it tends in any degree to prove, and hence the court is not required, in considering the demurrer, to weigh or reconcile conflicting evidence, nor to consider that which favors the demurrant when in conflict with other evidence against him.

NEGLIGENCE.—Railroad.—Highway Crossings.—A railroad company is entitled to precedence at highway crossings, on condition that it shall give reasonable and timely warning of the approach of its trains, and a failure to give such warning is negligence.

SAME.—Warning Signal at Railroad Crossing.—The obligations of railroads and travellers on highways at crossings are mutual, the same degree of care being required of each, and the right of precedence belonging to the railroad does not relieve it of the duty to give proper warning of its approaching trains, nor to use reasonable care to avoid collision.

SAME.—Excessive Damages.—Where, without fault, the plaintiff's son, aged sixteen years, is seriously injured by the negligent management of a railroad train, so as to be unconscious for a time and disabled for some weeks, a verdict for \$530 damages will not be held excessive.

From the Knox Circuit Court.

S. O. Pickens and *H. Burns*, for appellant.

MORRIS, C.—This suit was brought by the appellee against the appellant to recover damages for an injury, alleged to have been inflicted upon her minor son, James McLin, by the appellant, through its carelessness and negligence, without any fault or negligence on the part of the appellee or her said son.

The complaint contained three paragraphs, to which the appellant answered by a general denial. The cause was submitted to a jury, and, after the appellee closed her evidence in chief and rested her case, the appellant demurred to the evidence. The jury was directed to return a verdict, assessing the appellee's damages conditionally, which was done, and the damages assessed at \$530.

The court overruled the appellant's demurrer to the evi-

80	435
128	550
82	435
134	400
136	265
138	686
82	435
139	375
82	435
171	594

The Indianapolis and Vincennes Railroad Company v. McLin.

dence, to which the appellant excepted. The appellant moved the court for a new trial of the issues in the cause, which motion was overruled. It also moved the court for a new trial as to the assessment of damages, which motion was overruled.

The rulings of the court upon the demurrer to the evidence and upon the motions for a new trial are assigned as errors.

The error alleged to have been committed by the court, in overruling the motion for a new trial of the issues, is not pressed by the appellant, and will not be noticed. The evidence is properly in the record.

It appears from the testimony, that, on the 17th day of September, 1878, the appellee's son, then about sixteen years of age, was seriously injured by a collision of a passenger train on the appellant's railroad, with a wagon drawn by two horses and driven by one William Sirp, who was a boy some sixteen years old. The collision occurred at a highway crossing of the appellant's road, about a mile southwest of Edwardsport. The highway crosses the appellant's road at an angle of about forty-five degrees; the highway runs north and south and the railroad northeast and southwest. At the crossing, the railroad is built upon an embankment seven to eight feet above the natural level of the ground; this embankment diminishes gradually from the crossing northeast 200 yards to a point where a cut begins; this cut extends northeast through a hill or elevation about 600 feet long, the greatest depth of the cut being eight or ten feet from the rail to the surface on top of the ground. From a point one-half mile northeast of the crossing the railroad runs upon a straight line and a gradually descending grade to and southwest of the crossing.

The highway runs upon a straight line from a quarter of a mile or more north of the crossing to and south of the crossing. About forty or fifty rods north of the crossing it ascends a hill of the same height as the hill through which the railroad cut is made; the fill in the highway to make the ascent upon the railroad from the north begins about thirty feet north of the center of the railroad; clumps of bushes, ranging

The Indianapolis and Vincennes Railroad Company v. McLin.

in height from fifteen to twenty feet, were growing in a field in the angle north of the railroad and east of the highway, beginning near the highway and running northeast parallel with the railroad about sixty feet, and from thirty to forty feet from it. On the day of the accident, shortly after 12 o'clock M., the train on appellant's railroad, consisting of a locomotive, one baggage and mail car and two passenger cars, was approaching the crossing from the northeast on time, at about thirty to thirty-five miles per hour. At the same time, appellee's said son and three other boys of similar age, in full possession of their senses of seeing and hearing, were, in a common two-horse wagon, approaching the crossing from the north, on the highway, at the ordinary walking speed of a team of horses attached to a wagon. Appellee's son was sitting down in the bed of the wagon and the other boys were sitting on a seat-board just in the rear of the first wheels. As the wagon got upon the crossing, the engine struck it in the front wheels, demolishing it, injuring the horses slightly, killing one of the boys, and injuring appellee's son and one of the other boys.

William Shiveley, a witness for the plaintiff, being duly sworn, testified as follows:

"Know the plaintiff and know the boy, but not very long. I live at Edwardsport; I know the place of the accident; the Vincennes and Wheatland road crosses the railroad at that point; it was a public highway, and used by the public generally; knew condition of crossing September 17th, 1878; not in very good condition; the dirt was washed away from the side of the rails; it was bad on both sides, but worse on north side. I owned land near the crossing; at the crossing, the fill of the railroad is seven or eight feet high and a hill to pull up; the dirt is worn away next to the rails; in crossing, it would check the horses; cross-ties projected outside of the rails and made a raise for horses and wagon to pull up, and, in pulling up, horses and wagon would be checked; there are some willow bushes in the corner of the field near the

The Indianapolis and Vincennes Railroad Company v. McLin.

crossing ; some of these are fifteen or twenty feet high ; they had leaves on them at time of the accident ; some near the railroad, smaller ones, and some in my field ; there were some dry brushes, also ; the railroad, from the crossing in the direction of Edwardsport, is straight for over eighty rods ; man on crossing can be seen from eighty rods towards Edwardsport ; I heard noise of the collision, but did not see it ; I did not hear bell ring or whistle before the collision ; the noise of the collision was the first thing that attracted my attention ; the wind was blowing pretty strong from the south ; don't know what effect the blowing of the wind would have on the hearing of the train ; I went to the crossing ; did not see James McLin ; the hind part of the wagon and bed were on the north side of the railroad, in field, and forepart of wagon was 200 yards down the railroad on the south side ; the horses were going south on the road ; the horses were not killed."

On cross-examination said witness testified as follows :

"The holes in the ground on the side of the railroad were made by wagons passing over the road ; planks on outside of each side of the rails ; my land is on the north side of the railroad and east of the wagon road, in the angle ; the highest willows are inside of my field ; my fence, at the crossing, is about forty feet from the center of the railroad, and, as it runs up side of the railroad, it is sometimes closer, and sometimes further off ; the fill at the crossing is seven or eight feet high, and is higher than the fence, and runs on a fill higher than the fence nearly back to the cut ; from the crossing to the cut is about twenty-five or thirty rods ; the willow bushes are in bunches, some of them fifteen or twenty feet high ; I saw the boys first just below Edwardsport, going towards the crossing ; my son, Thomas Shiveley, and I were in a wagon, behind them ; they were in a wagon ; we came up close to them at the top of the hill, about fifty rods from the crossing ; I got out of my wagon there and went over into my field on the east side of the wagon road ; the boys were just before our wagon there ;

The Indianapolis and Vincennes Railroad Company v. McLin.

William Sirp was driving their team, sitting on seat-board at front of wagon, and the other boys were down in the wagon bed playing over and under the seat-board ; the boy that was driving was playing some, too ; they were driving along slow, in a walk ; I did not see the train before the accident ; I was about forty rods from the crossing at the time of the accident and nearer the cut ; I was northeast of the crossing ; I was shucking corn in my cornfield ; from the foot of the hill on the wagon road, north of the railroad, can see train coming out of the cut ; at a point near the crossing, could not see the train ; this is for twenty-five or thirty yards ; at all other points from the hill to the crossing, the train can be seen ; it is thirty rods from the foot of the hill, north of railroad, to the crossing ; from that point the smoke of the train could be seen coming through the cut ; the foot of the fill at the crossing, on the north side, is about thirty feet from the railroad ; on this fill the train could be seen coming out of the cut ; there were some brushes and briars on the fill four or five feet high ; when on the fill, the train could be seen coming from the northeast eighty or 100 rods ; the boys had an ordinary team ; the boys lived south of railroad, in river bottom ; they came over that road and crossing pretty often ; person at foot of fill, on wagon road, on north side of railroad, could hear the train coming from the northeast if he were to stop ; if wind was blowing it might affect it, but I think they could hear it ; I think it could have been heard that day if they had stopped and listened at that point ; I heard it, was forty rods away, and am partly deaf, can't hear well out of right ear ; I think the train could have been heard coming from the northeast that day, at any point on the highway from the foot of the fill back to the hill north ; I stood on higher ground than the dirt road where the boys were just before starting up the fill at crossing."

William Sirp, witness for the plaintiff, being duly sworn, testified as follows:

" I know the plaintiff and her son James ; have known him

The Indianapolis and Vincennes Railroad Company v. McLin.

six or seven years; I knew him at the time he got hurt on the railroad; I was in the wagon that was struck by the cars; I was driving the horses; the crossing was in a bad condition; the fore wheels stopped when they struck the plank nailed on cross-ties just outside of the rail, and the hind wheels did the same, and each kind of checked the horses; I was driving, and was in the forepart of the wagon; I looked up and down the track and did not see the train; I drove on the track and was struck by the train and rendered insensible; I did not hear the train; I was listening; the wind was from the southwest at the time."

On cross-examination said witness testified as follows:

"I had been to Edwardsport to take a beef hide; John Sirp went with me; James McLin and John Bundle got in the wagon after we started and went along; this was in the morning, and I stayed there until noon; then we all started home in the wagon; I had steel-traps, sugar and coffee in wagon, and nothing else; I was sitting on seat-board, on the right side, driving in front part of wagon; the other boys were in back part of wagon; the boys were playing until we got within 300 or 400 yards of the railroad; we knew the train was about due and were expecting it; when in about thirty feet of the railroad I began looking for the train; could see up the road about 100 yards; we did not stop to look or listen; when we were within twenty feet of the railroad I could see up as far as the first cut; could not see any further because the road crooks towards Edwardsport; could see clear up to the crook towards Edwardsport when twenty feet from track on north side of railroad; think the railroad is only straight quarter of mile; we were about one minute going from twenty feet on north side of railroad to point where we were struck; from twenty feet north of railroad we were about two minutes getting up on railroad; fore wheels of wagon struck the railroad and kind of stopped; did not see or hear the train until wagon was struck; I was trying to get the horses across the rail-

The Indianapolis and Vincennes Railroad Company v. McLin.

road ; I was not looking at the boys playing before going on the railroad ; the wagon was making noise ; the horses were going in a walk up grade to railroad ; my father has a suit pending in this court for an injury to me and my brother received at the time."

James McLin, witness for the plaintiff, being duly sworn, testified as follows :

"I am the son of the plaintiff; on September 17th, 1878, I lived with my mother; I went to Edwardsport that day; got in wagon at railroad crossing and went with William Sirp; came back in the wagon and was hurt by the cars at the railroad crossing; saw William Shiveley in wagon behind us; William Sirp was driving wagon we were in; Thomas Shiveley was in wagon behind us; I was sitting in back part of wagon, on bottom; William and John Sirp and John Bundle were in the wagon; I knew the railroad was there; I had my left side to the left side of the wagon, and had my face fronting towards the horses; I could see part of way up the railroad; I looked up the railroad for the cars when starting up fill at the crossing, and did not then see the cars; I had been playing, but was not when wagon went upon the railroad; I knew nothing after cars struck me until the next day about 10 o'clock; I was confined to bed; my leg was hurt; it was sore a good while; I did not see or hear any train before wagon was struck; don't know how the wind was; I listened before we started up the grade on the track; my collar bone and head were hurt."

Upon cross-examination, said witness testified as follows :

"I am seventeen years old; was seventeen last August; all the boys were sitting on the seat-board at time of accident, except me; they had been sitting there all the time; I was sitting back and playing by myself, in back corner of the wagon; I testified on the other trial of this cause; I don't think I stated that I did not listen or look; I listened while down in the low place; the wagon was not stopped; wagon was rattling and making noise; I looked for cars at foot of

The Indianapolis and Vincennes Railroad Company v. McLin.

grade and upon the grade, and then I saw the train just as it struck the wagon ; I had good sight and hearing."

Thomas Shiveley, witness for the plaintiff, being duly sworn, testified as follows :

" I know plaintiff and James McLin, her son ; September 17th, 1878, I lived at Edwardsport with my father ; on that day, I saw the Sirp boys and John Bundle and James McLin at Edwardsport near noon, on road, in wagon, between Edwardsport and the crossing ; William Sirp was driving, and the other boys were playing in bottom of the wagon ; I was behind them in a wagon with my father, William Shiveley ; the boys were playing with some cans ; at the foot of the hill, near the crossing, the boys stopped the wagon to fix the tire on the wagon wheel ; when near the railroad, one of my horses began to prick up his ears and was uneasy ; I looked up and saw smoke of train about one-half mile off ; I saw the train was coming very fast, and halloood at the boys, but I don't think they heard me, as they paid no attention to me and went ahead ; at the time the boys struck the railroad, the train was in the cut ; the train had not reached the first cut northeast of crossing when I halloood to the boys ; there was a raise of near a foot of the wheels of the wagon to get upon the railroad track ; the wagon seemed to hang and then raised on to the track, and the hind wheels of the wagon hung when they struck the rail, and then the engine struck the fore wheels of the wagon ; the engineer reversed the engine about sixty feet before it struck the wagon ; I got out and went to the boys and found them hurt ; James McLin was lying on the ground with his head under him, and his head, neck and leg were injured ; bleeding at ears and mouth ; I opened his collar ; the train ran 302 steps, or about 300 yards, west of the crossing, before it stopped ; the forepart of the wagon was thrown off there ; the train then backed up to the crossing and the boys were put on ; the horses were not killed, but hurt some, and they ran off on the road south ; did not hear any signal given by the engineer, except when the engine was reversed the bell

The Indianapolis and Vincennes Railroad Company v. McLin.

tapped twice; the train was going faster than usual; they usually go pretty fast there; it was down grade; black smoke was coming out of the smokestack; on the north side of the railroad and on the east side of the highway were some willow bushes—some in father's field and some between the fence and the railroad; think when wagon was upon railroad, the Sirp boy raised up in wagon, as though to make the horses go faster; the train was passenger train—two coaches and baggage car; I have travelled a good deal on railroads and seen trains stopped in about 100 yards; it was about 300 yards from the crossing to the beginning of first cut; the cars were about at the mouth of first cut when the boys got on the track; it is tolerably heavy down grade there; there are other grades heavier on the road; I have often seen trains pass at the point where the accident occurred; I have often seen trains stopped on road by application of air brake; this train was provided with air brakes; the train could have been stopped between the cut and the crossing; there were bushes and briars and weeds, from the fence to the railroad track, and inside of the fence the bushes were higher; a person at foot of grade going up on the railroad is about thirty feet from the railroad track; the road up to the railroad is just wide enough for a wagon, and, after going up to the railroad, the wagon could not turn around and go back, but could be backed off; the dirt road had been narrowed at the crossing by the removal of earth, leaving single wagon track; when engine struck the wagon, William Sirp was thrown up as high as the top of the smokestack; the other boys were thrown, with the wagon bed, on the west side of the road into the field; person on the railroad, at the crossing, could see east on the railroad, one-half mile, and the engineer might see a man on the crossing for the same distance; the wagon hung on the track about half a minute before the collision; I was once riding on defendant's railroad when train was running very fast, and cow got on track, and train was stopped in 100 yards; this was on heavier grade

The Indianapolis and Vincennes Railroad Company v. McLin.

than at the road crossing where McLin was hurt, and was near Eel river."

On cross-examination, the witness testified that the appellee's son had attended a school taught by him; that he learned well and had his hearing.

There were other witnesses who testified, but their testimony was substantially in agreement with the foregoing. All the witnesses testified that the appellant did not ring a bell or give other warning as the train approached the crossing where the appellee's son was injured. It was admitted by the appellant that it owned, and was running upon its road, the train of cars which struck and injured the appellee's son.

The appellant insists that from the testimony it appears,

First. That the injury complained of was not caused by its negligence.

Second. That the negligence of appellee's son proximately contributed to his injury.

Third. That the damages are excessive.

The appellant contends that its demurrer to the evidence admits the truth of the facts proved—"demonstrated"—not the truth of the facts testified to by the appellee's witnesses. We understand the rule to be, that the demurrer admits all the facts to be true which the evidence offered by the other party *tended in any degree* to prove; that regularly, if the evidence is loose, circumstantial or uncertain, the duty of weighing and reconciling it can not be withdrawn from the jury and devolved upon the court by a demurrer to the evidence; but that, in such case, the demurrant should specify the facts proposed to be admitted, and then the other party, if called upon to join in the demurrer, may refer the question as to whether he is bound to join, to the court for decision. But in this State the party is allowed to demur by setting out the evidence and admitting all the facts which it tends to prove. This does not devolve upon the court the decision of the facts. It would obviously do so if the admission did not embrace all the facts which the evidence tends to prove. This

The Indianapolis and Vincennes Railroad Company v. McLin.

mode of proceeding is more convenient and better adapted to our system of practice than would be the stricter and more technical method of the common law.

In the case of *Wright v. Pindar*, Style, 34, quoted in the case of *Copeland v. New England Ins. Co.*, 22 Pick. 135, Chief Justice ROLLE says: "Matter of fact ought to be agreed in a demurrer to evidence, otherwise the court can not proceed upon the demurrer; for the judges can not try the matter of fact, for that were for the judges to give the verdict, which belongs to the jury."

In the case of *Young v. Black*, 7 Cranch, 565, Judge STORY says: "The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove."

In the case of *Fowle v. Common Council of Alexandria*, 11 Wheat. 320, the court says: "It is no part of the object of such proceedings," (a demurrer to the evidence,) "to bring before the court an investigation of the facts in dispute, or to weigh the force of testimony or the presumptions arising from the evidence. That is the proper province of the jury. * It supposes, therefore, the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts." Gould states the law to be the same. Gould Pleadings, section 47.

In the case of *Copeland v. New England Ins. Co.*, *supra*, the court say: "The defendants too, by demurring, admit the facts which the evidence conduces to prove for the plaintiffs, and can not avail themselves of such as it tends to show for the defendants. The plaintiffs, by joining in the demurrer, did not admit the truth of that part of the testimony which is favorable to the defendants, much less any inferences which may be drawn from it." And this, we think, must be the correct rule; else the court, in passing upon the demurrer, must weigh the evidence, and reconcile it if conflicting or in-

The Indianapolis and Vincennes Railroad Company v. McLin.

consistent. In other words, the demurrer brings before the court the facts for investigation. This it can not do.

In the case of *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134), the court says: "By a demurrer to the evidence, all the facts of which there is any evidence are admitted." *Miller v. Porter*, 71 Ind. 521; *Eagan v. Downing*, 55 Ind. 65; *Newhouse v. Clark*, 60 Ind. 172. These cases are in substantial agreement with the authorities cited above. "A demurrer to the plaintiff's evidence admits all the facts that the evidence tends to prove." Wharton Ev., section 840. To the same effect is the case of *Golden v. Knowles*, 120 Mass. 336; *Lemmon v. Whitman*, 75 Ind. 318 (39 Am. R. 150).

There was evidence introduced by the appellee, tending to prove that the appellant was running the train at the time it struck the appellee's son, at the rate of thirty-five miles per hour, or something over a half mile a minute; that no bell was rung as the train approached the crossing, or other signal or warning of its approach given; that the engineer on the train could have seen the wagon in which the appellee's son was riding, from the time the engine emerged from a cut some two hundred yards distant from the crossing; that there were air brakes on the train, and that with them the train could have been stopped in one hundred yards. As we understand the meaning and effect of the demurrer, as there was testimony tending to prove the facts above stated, we must assume them as true. Taken as true, there is hardly room for doubt upon the question of the appellant's negligence.

Shearman and Redfield, in speaking of the duty of railroad companies to give warnings at the crossings of highways, of the approach of trains, say: "It is the duty of the engineer * to give sufficient signals of the approach of the train, by ringing his bell, sounding the whistle, or otherwise, as may be usual." Neg., 3d ed., sec. 481.

In the case of *Continental, etc., Co. v. Stead*, 95 U. S. 161, the court says: "The train has the preference and the right of way. But it is bound to give due warning of its approach, so

The Indianapolis and Vincennes Railroad Company v. McLin.

that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It can not be such, if the speed of the train be so great as to render it unavailing. * * The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train."

The day was windy and there were bushes tending in some degree to obstruct the view of trains approaching the crossing in question. We think it must be held that the negligence of the appellant caused the injury complained of to the appellee's son. There should have been some warning given of the approach of the train to the crossing.

Was the appellee's son guilty of contributory negligence? If it were the duty of the court upon this demurrer to weigh the evidence, and, in view of all the circumstances, determine its force, the question would, to say the least, be left in great doubt.

The injured boy swears that he knew where the railroad was; that he could see part way up the track; that he looked up the railroad for the cars; that he had been playing, but was not when the wagon went upon the railroad; that he did not see nor hear any train before the wagon was struck; that he listened for the train before starting up the grade to the track; that he listened while down in the low place; that the wagon was rattling and making a noise; that he looked for the cars at the foot of the grade and when on the grade.

Taking these statements in connection with the fact that the train was running at such a rate of speed that it would pass from the cut to the crossing, about 200 yards, in less than fifteen seconds, and with the further fact that no warning of the approaching train was given, it can not be said,

The Indianapolis and Vincennes Railroad Company v. McLin.

we think, that the boy was guilty of contributory negligence. Indeed, he had done all that care and prudence could require. He had stopped and looked and listened. He had a right to expect that if the train was approaching, some timely and reasonable warning would be given. None was given. He had, therefore, a right to assume that the passage over the railroad might be made without danger from the appellant's trains.

William Sirp, who controlled and drove the wagon in which the appellee's son was riding, testified that he looked and listened for the train, but did not hear or see it.

The testimony of these boys, was not, seemingly, consistent with that of Thomas Shiveley and some other witnesses. Shiveley states that he was in a wagon just behind that in which McLin was riding; that he saw from the hill the smoke from the engine when it was about a half mile from the crossing; that he called to the boys, but they did not hear him. This may all be true, and yet it does not follow necessarily that the boys in the forward wagon could have seen the smoke. Their position and intervening objects might have prevented them from seeing the smoke. But, however this may be, we can not, upon the demurrer, undertake to weigh or reconcile the evidence. As there is testimony tending to show that there was no negligence on the part of James McLin contributing to his injury, we must regard him as free from fault.

The obligations of railroads and travellers at intersecting highways are mutual. The same degree of care is required of each. "For," as said in the case of *Continental, etc., Co. v. Stead, supra*, "conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition."

The Indianapolis and Vincennes Railroad Company v. McLin.

We can not say that the damages were excessive. The appellee's son was seriously injured. He was unconscious for some time, and disabled for some weeks. The jury gave \$530 damages. Unless at first blush they seem to be excessive, this court should not disturb the verdict. We think there is no error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the appellant's costs.

ON PETITION FOR A REHEARING.

MORRIS, C.—An able and earnest petition for a rehearing has been filed in this case.

The appellant's counsel, conceding that the testimony tends to show that the injury complained of was produced by its negligence, insists that, unless the evidence also shows, or tends to show, that the appellee's son was free from contributory negligence, the demurrer to the evidence should have been sustained; and in determining this question he insists that all the testimony, as well that which was elicited on cross-examination by the appellant, as the testimony in chief put in by the appellee, must be considered. We understand the counsel to go further, and to contend that if there is any conflict in the testimony, as set out in the record, the court, in deciding upon a demurrer, shall weigh it, and deduce from it such conclusions as a jury might reasonably have reached. If there is testimony tending to show that the injured party was free from fault, and other portions of the testimony tend to show, by an apparent preponderance, that he was guilty of contributory negligence, the demurrer should be sustained.

We agree with the appellant that the burden was upon the appellee to show that her son was not in fault; that his negligence did not contribute to his injury, and that, unless the testimony tended to show that he was free from fault, the demurrer to the evidence should have been sustained. And we also further agree with the appellant, that, for the purpose of

The Indianapolis and Vincennes Railroad Company v. McLin.

determining whether there was any testimony tending to show the injured party free from fault, the court should consider all the evidence in the case. But we still think, as was held in the opinion already announced in the case, that if there was any testimony in the case, legally tending to show that the appellee's son was not guilty of contributory negligence, then the demurrer was rightly overruled, though other portions of the testimony tended to show, with preponderating force, that he was in fault. The court will not weigh, nor undertake to reconcile, such conflicting testimony. If there is conflicting testimony to be reconciled and weighed, it is the right of the parties to have this done by a jury, and neither party can deprive the other of this right by demurring to the evidence. Had one witness testified to facts legally tending to show the injured party free from fault, and had two or a half a dozen other witnesses testified to conflicting or other facts, tending legally to prove him guilty of contributory negligence, a jury, had the question been submitted to them, might have believed the one and disbelieved the half a dozen witnesses, and found the appellee's son free from fault. And, had such been the case, this court would not disturb the verdict upon appeal. So, upon demurrer to the evidence, the court will consider all the evidence, for the purpose of determining, as a matter of law, whether there is any evidence tending to show that the appellee's son was free from fault; if there is such testimony in the record, the court will draw the conclusion against the demurrant. This the court must do, or usurp the duties and functions of the jury. If the court undertakes to weigh or reconcile the testimony or determine the credibility of witnesses, it must, obviously, assume the functions of the jury. This it should not do.

The only question in the case is, was there any testimony legally tending to show that the appellee's son was free from fault? The appellant contends that there was not.

It appears from the testimony that the train of the appellant, which struck the wagon in which the appellee's son was

The Indianapolis and Vincennes Railroad Company v. McLin.

riding, passed through a cut north of the crossing, about 600 feet long, and, at places, some ten feet deep. From the cut to the crossing, about 300 yards, the road was built upon an embankment at places eight feet high. There were bushes and briars growing upon the right of way and in adjoining fields, tending, in some measure, to obstruct the view and interrupt the sound of trains moving upon the appellant's road. The train approached the crossing at a speed of thirty-five miles per hour; no bell was rung nor whistle sounded. The highway, upon which the appellee's son was travelling, runs north and south, and passes over a hill some forty or fifty rods from the crossing. A short distance from the crossing, about fifty yards, there is a depression in the highway, from which a train moving through the cut on appellant's road could not be seen. The highway begins to ascend to the crossing about thirty feet from the center of the railroad track. The appellee's son was riding in a two-horse wagon, with three other boys about his own age. The team was driven by one William Sirp, who had the rightful control and management of it and the wagon. The crossing was in bad condition, and, when driven upon by Sirp, the fore wheels of the wagon were stopped by the plank nailed on the ties. The foregoing facts are not disputed. It may be fairly inferred, from his age, that William Sirp, who had charge of the team and wagon, was competent and fit to take and have charge of them.

William Sirp swears that he was driving the horses; that the crossing was in bad condition; that the fore wheels of his wagon stopped when they struck the plank nailed on the ties; that he looked up and down the track, but did not see the train; that he drove on the track, was struck by the train and rendered insensible; that he did not hear the train.

James McLin, the appellee's son, who was injured, testified that he got into the wagon with William Sirp, who was driving it; that he could see part of the way up the railroad; knew it was there; looked up the railroad for the cars when they started up the fill at the crossing, and did not see the

The Indianapolis and Vincennes Railroad Company v. McLin.

cars; had been playing, but was not when the wagon went upon the railroad; did not see or hear anything before the wagon was struck, though he listened before they started up the grade on the track.

In determining the force of the above testimony, it must be borne in mind that James McLin had a right to act in some degree, upon the assumption that the appellant would give timely warning of the approach of its trains by the usual signals, and that he had also a right, in some measure at least, to rely upon the prudence and care of the young man in charge of the team. If, as he swears, he looked and listened for the train when they began to ascend the grade, not more than thirty feet from the center of the railroad, and did not see nor hear the approaching train, was he not free from fault? What else was it his duty to do? He looked and listened, but could neither see nor hear an approaching train. No bell was ringing, no whistle sounding. Everything indicated the absence of danger. He had a right to know, for such is the law, that it was quite as much the duty of the appellant to give timely warning of the approach of its cars to the crossing, as it was his duty to listen for such warning. He listened, but there was no warning; he looked but no train or danger could be seen. This was all the law, under the circumstances, required. While it is true that the failure of the appellant to give warning did not relieve the appellee's son from exercising care to avoid injury, yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care required or not. *Continental, etc., Co. v. Stead*, 95 U. S. 161.

The appellant, however, insists that to look and listen was not enough; that the appellee's son should have stopped the wagon. We think that to so hold, under the circumstances of this case, would be to devolve upon the traveller too exclusively the risks and duties at railroad crossings, and to relieve the appellant too entirely from responsibilities which the law justly imposes upon it. Admitting itself to have

The Indianapolis and Vincennes Railroad Company v. McLin.

been in fault, the appellant seeks to escape from the consequences of its own wrong, because the appellee's son is blamable for not stopping the wagon in which he was riding, though he neither had the management nor control of it.

In the case of *Masterson v. New York, etc., R. R. Co.*, 84 N. Y. 247 (38 Am. R. 510), the plaintiff was, by the invitation of the driver, a stranger to him, riding in a wagon upon a highway crossed by defendant's road. A wheel of the wagon went into a hole between the rails of defendant's track, and he was jolted from the wagon and killed. It appeared that the driver was a sober man, and apparently fit to have charge of the team. The defendant asked the court to charge the jury, that if the driver's negligence was the proximate cause of the jar, the plaintiff could not recover. The court refused this charge; the court of appeals held the refusal right, on the ground that the deceased had no control of the wagon, and was not guilty of negligence in riding in it with the driver.

In the case of *Dyer v. Erie R. W. Co.*, 71 N. Y. 228, which is really this case, it was held that where one travels in a vehicle over which he has no control, but at the invitation of the owner and driver, no relationship of principal and agent arises between them, and that although he so travel voluntarily and gratuitously, he is not responsible for the driver's negligence, where he himself is not chargeable with negligence, and where the driver was competent to control and manage the team. The same doctrine was held in the case of *Robinson v. New York, etc., R. R. Co.*, 66 N. Y. 11 (23 Am. R. 1).

In the above case the authorities are extensively reviewed and carefully considered. In holding that the appellee's son was not, under the circumstances of this case, guilty of negligence because he did not stop before going upon the appellant's road, we need not, nor do we, go so far as the above cases go; we only hold that the facts tend to show that the injured party was free from fault.

It is true, as the appellant contends, that the testimony of Thomas Shiveley tends strongly to show that if the appellee's

Whitworth *et al.* v. Malcomb.

son had listened he might have heard the approaching train; but the son's testimony tends just as strongly to prove that Shiveley could not hear the train, as does the latter's tend to prove that the former could have heard it. We will not attempt to determine which was right. The team, which was hauling appellee's son, was going slowly. It would take it some seven or eight minutes to pass from the hill to the crossing, some forty or fifty rods. When the wagon was on the hill, the train must have been at Edwardsport, and when the team was in the low part of the highway, some thirty feet from the railroad track, the train was probably in the cut, and not visible to the appellee's son. It would pass, going at thirty-five miles per hour, from the middle of the cut to the crossing, while the team would pass up the grade on to the track. It is, therefore, not at all improbable, that the appellee's son looked and listened, and neither heard nor saw the coming train.

The petition should be overruled.

PER CURIAM.—Petition overruled.

No. 8109.

WHITWORTH ET AL. v. MALCOMB.

82	454
158	308

PROMISSORY NOTE.—*Pleading.*—*Exhibits.*—Where, in a complaint on a promissory note, it is averred that the note "is filed herewith," and in the transcript there appears next to the complaint a copy of a note corresponding to that declared on, it is a sufficient identification of the exhibit. A separate file-mark upon the exhibit is not necessary when it is attached to the complaint.

From the Posey Circuit Court.

M. W. Pearse, for appellants.

E. M. Spencer, for appellee.

WOODS, J.—The appellants have assigned for error that

Niven *et al.* v. Burke.

the complaint does not contain facts sufficient to constitute a cause of action.

The objection made to the complaint is stated in the brief as follows: "The complaint avers that 'defendants executed their note which is filed herewith.' What purports to be the note itself is placed in the complaint, but there is no filing mark upon it, and there is nothing to show that it ever was filed, and no copy of the same is set out in the body of the complaint." For support of this objection we are referred to *Conwell v. Clifford*, 45 Ind. 392, and *Stafford v. Davidson*, 47 Ind. 319. The cases, however, are not in point. In the first the copy of the writing did not appear in the transcript, and it was held not sufficient to state that the writing was filed; "it must be filed." And in the other case it was held that a mere filing of the instrument without a reference to it in the pleading was not sufficient.

In this case the complaint contains a sufficient reference to the note. *Carper v. Kitt*, 71 Ind. 24. The record shows the filing of the complaint, and the transcript of the complaint is followed by a copy of the note.

There may be a filing without a file-mark, which is only evidence of the filing. If the note was attached to the complaint, the filing of the complaint was necessarily a filing of the note.

Judgment affirmed, with costs.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 9126.

NIVEN ET AL. v. BURKE.

SUPREME COURT.—*Demurrer*.—*Exception*.—*Practice*.—The ruling of the trial court upon a demurrer presents no question to the Supreme Court unless an exception was reserved to the ruling.

Niven *et al.* v. Burke.

REPLEVIN.—*Chattel Mortgage.—Possession of Property.*—The owner of personal property who executes a chattel mortgage thereon, containing a stipulation that he may retain possession thereof until the maturity of the debt, can, if the mortgagee takes possession of such property before that time, recover its possession in an action of replevin.

From the Boone Circuit Court.

C. S. Wesner and W. R. Moore, for appellants.

T. J. Cason, R. W. Harrison and S. M. Burke, for appellee.

BEST, C.—This action was brought by the appellee against the appellants, to recover a law library, office furniture and some other personal property.

A demurrer was overruled to the complaint and appellants filed an answer of two paragraphs. The first was a general denial, and the second averred that the appellee had executed a chattel mortgage upon the property to John Niven, one of the appellants, for \$1,500; that, after default had been made, the appellee transferred the property to Niven in full satisfaction of the mortgage, and that satisfaction had been duly entered of record. This was denied. The issues were submitted to a jury, and a general verdict returned for the appellee. A motion for a new trial was overruled, and final judgment rendered upon the verdict.

The errors assigned are that the court erred in overruling the demurrer to the complaint, and in overruling the motion for a new trial.

An examination of the record shows that the appellants did not reserve an exception to the ruling of the court upon the demurrer, and, therefore, that assignment presents no question.

The reasons embraced in the motion for a new trial were, that the verdict was not sustained by sufficient evidence, and was contrary to law.

The property in dispute belonged to the appellee, and he was entitled to its possession unless his title had been divested by the execution of the chattel mortgage. The proof utterly failed to establish the fact that he had transferred it in payment of the mortgage, and, therefore, if appellants were en-

Overmyer *et al.* v. Cannon.

titled to it, they held it by virtue of the mortgage. The mortgage recited that it was given to secure \$1,500, evidenced by certain promissory notes and accounts, but it was not stated when these claims matured. Among other stipulations in the mortgage, it was provided that "the said Samuel W. Burke shall retain possession of said property hereby sold until said indebtedness shall become due," and the evidence wholly failed to show that anything whatever was due upon the mortgage. Unless something was due, the appellants were not entitled to the possession. Indeed, it is doubtful whether the appellee owed anything upon the mortgage.

Again, a portion of the property taken and detained was not included in the mortgage, and, as to this portion, the appellants had no claim whatever. The verdict was right, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed in all things, at the appellants' costs.

No. 9305.

OVERMYER ET AL. v. CANNON.

83	457
149	68

CORPORATION.—*Stockholders' Liability.*—*Joinder of Parties.*—A creditor may, under section 3883, R. S. 1881, join all the stockholders of an insolvent corporation in one action.

SAME.—*Pleading.*—*Complaint.*—In such action, an allegation in the complaint, that the defendants are stockholders, is a sufficient statement of fact without showing how they acquired stock.

SAME.—*Judgment.*—*Apportionment of Liability.*—In such case, the judgment should be so moulded as to make the proper apportionment among the defendants, according to the amount of stock held by them respectively.

From the Pulaski Circuit Court.

N. L. Agnew, J. C. Nye and G. Burson, for appellants.

W. Spangler, for appellee.

Overmyer et al. v. Cannon.

ELLIOTT, J.—Appellants were stockholders in a corporation organized under the provisions of an act entitled "An act to provide for the incorporation of State, District, County, Subordinate and Individual Association of Patrons of Husbandry, and matters properly connected therewith, and declaring an emergency." The corporation had become insolvent, and the action is against the stockholders individually, to recover a debt incurred by the corporate officers.

It was not necessary for the appellee to state the particular manner in which the appellants acquired their stock. A plaintiff is not required to plead matters of evidence, it is sufficient for him to state facts. The averment that the appellants were stockholders is the statement of a fact. If this fact is denied, it must be proved by competent evidence, and this imposes upon the plaintiff the burden of showing the manner in which the stock was acquired. The complaint before us directly avers that the appellants are stockholders, and states the amount of stock owned by each, and can not be regarded as subject to the objection urged against it.

Appellants were jointly sued. A judgment for the entire amount was rendered, but a provision was inserted, directing what amount each of them should pay. The appellants were several and not joint owners of stock.

The question of the right of the appellee to maintain a joint action is presented in various forms, and we are therefore required to decide whether the creditor can maintain a joint action, or must bring separate actions, for the recovery of the amount for which each stockholder is liable.

We think the statute creating the liability confers upon the creditor the right to join all of the stockholders in one action. It reads thus: "That the stockholders of such corporation (whether the original signers of such articles of association, or the persons signing the same subsequently, or the person or persons to whom any shares of stock may be transferred or held under the regulations of such corporations) shall be liable, individually and jointly, * to an amount equal to the stock held

Crane v. Crane *et al.*

by them respectively." R. S. 1881, section 3883. Whether the liability created is in the strict sense of the term a joint one, we need not enquire, for it is certainly so in such a sense as to permit the creditor to join all the stockholders in one action.

In our opinion, the court adopted the proper practice in giving the appellee a judgment for the entire amount, and apportioning it among those who are bound to pay it. Certainly no injustice is done the appellants, for they are held only for the amount which the law fixes as the measure of their liability. The rule in equity is, that all the stockholders should be joined, and the decree so moulded as to make the proper apportionment, and this is the proper practice under our statute. *Umsted v. Buskirk*, 17 Ohio St. 113; *Perry v. Turner*, 55 Mo. 418; *Pierce v. Milwaukee, etc., Co.*, 38 Wis. 253.

It is contended that the evidence fails to show that the appellants were stockholders. We have read it carefully, and have reached a different conclusion. It is shown that they attended corporate meetings; that some of them signed the original articles of association, and others subscribed for stock, and paid part at least of their subscription. There was no testimony offered in opposition to the evidence of appellee, and the trial court was justified in finding for him upon this question.

We are satisfied that the evidence fairly shows that the debt for which the appellant was sued was contracted by corporate officers for a corporate purpose.

Judgment affirmed.

No. 9535.

CRANE v. CRANE ET AL.

PLEADING.—*Consideration of Agreement.*—*Bill of Particulars.*—Under section 363, R. S. 1881, in a proper case, the defendant is entitled to a bill of particulars of the plaintiff's cause of action, and it would be error to

83	459
126	513

Crane v. Crane et al.

overrule his motion therefor; but where the complaint counts upon an agreement, and states the consideration of such agreement to have been divers sums of money, pieces of property and accounts, the defendant is not entitled to a bill of particulars of such moneys, property and accounts.

From the Miami Circuit Court.

J. M. Brown and *N. H. Antrim*, for appellant.

H. J. Shirk and *J. Mitchell*, for appellees.

Howk, J.—In his complaint in this case, the appellee Clinton Crane alleged in substance, that on October 16th, 1874, one Milton Shirk, cashier, etc., recovered a judgment in the court below against one Calvin H. Crane, as principal, and the appellant and the appellee Clinton Crane, as sureties, for \$3,610.99 and the costs of suit; that on the 15th day of February, 1875, the said Calvin H. Crane paid \$503.24 on said judgment, and that on December 18th, 1876, the appellant paid thereon about the sum of \$3,706.42 in full of the balance thereof, which latter payment was endorsed on said judgment; that on the 21st day of April, 1880, the appellant caused an execution to be issued on said judgment, in his behalf, against the appellee Clinton Crane, as his co-surety in said judgment, for the one-half of the amount so paid by him and interest thereon, and had the same delivered to the appellee O'Donald, as sheriff of Miami county, for service and collection; that on the 26th day of April, 1880, the said sheriff, by virtue of said execution, levied on certain real and personal property, particularly described, as the property of the appellee Clinton Crane, to satisfy said execution; and that, on the same day, the said sheriff advertised the said personal property for sale on the 8th day of May, 1880, to satisfy said execution.

And the appellee Clinton Crane averred that his said property ought not to be sold to satisfy the amount so paid by the appellant, or any part thereof, for the reason that on or about the 17th day of December, 1876, the appellant made an agreement with said Calvin H. Crane, the principal in said

Crane v. Crane et al.

judgment, by which agreement, for a valuable consideration, the appellant agreed to and with the said Calvin to pay for him the said judgment, interest and costs, which consideration was as follows: That previous to December 17th, 1876, the appellant and said Calvin H. Crane had mutual dealings with each other for a number of years, the said Calvin having furnished to the appellant various sums of money, and transferred to him various pieces of property, and the appellant had received large amounts of money belonging to said Calvin, and that they had mutual accounts against each other; that on or about said 17th day of December, 1876, they made an agreement, each with the other, that in consideration of the appellant paying said judgment, interest and costs for said Calvin, and the further payment to him of \$1,000, they would mutually balance their respective accounts against each other and settle them in full; and that, in pursuance of said agreement, the appellant immediately paid the said Calvin the sum of \$500, and subsequently paid the said judgment, interest and costs to the judgment plaintiff, and the said Calvin H. Crane balanced all his accounts against the appellant and marked the same settled. Wherefore the appellee Clinton Crane, prayed for a temporary restraining order, and, on final hearing for a perpetual injunction, and that, as to him, the said judgment might be declared satisfied, and for other proper relief.

The appellant moved the court in writing for a bill of particulars; which motion was overruled, and to this ruling he excepted and filed his bill of exceptions. He then demurred to appellee's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action; which demurrer was overruled, and to this decision he excepted. Refusing to plead further, the court rendered judgment against him, and the said sheriff, in favor of the appellee Clinton Crane, as prayed for in his complaint.

The following decisions of the circuit court are assigned by appellant as errors:

Crane v. Crane et al.

1. In overruling his motion for a bill of particulars; and,
2. In overruling his demurrer to the complaint.

The first of these supposed errors is the one chiefly relied upon by the appellant's counsel in their brief of this cause, for the reversal of the judgment below. The appellant moved the court to require the plaintiff to furnish a bill of particulars of the various sums of money and of the pieces of property transferred to appellant, and the accounts of said Calvin H. Crane against the appellant, referred to in the complaint. Appellant's counsel earnestly insist that the court erred in overruling this motion for a bill of particulars, and that for this error the judgment below ought to be reversed. We are not inclined, however, to adopt this view of the question. The various sums of money and the pieces of property and the accounts, referred to in the complaint, were not sued for in this action, but were mentioned in the complaint as constituting the consideration of the appellant's agreement that he would pay off the judgment, interest and costs, for the principal in such judgment. These sums of money, pieces of property and accounts constituted no part of the plaintiff's cause of action, and, therefore, the appellant was not entitled to any bill of particulars thereof. The defendant may be entitled, in a proper case, to a bill of particulars of the plaintiff's cause of action; and, in such a case, the court might, under the provisions of section 79 of the civil code of 1852 (sec. 363, R. S. 1881), order such bill of particulars to be furnished. The case at bar is not a proper one for a bill of particulars; and, therefore, we think that the court did not err in overruling appellant's motion for such bill.

Appellant's counsel say that the second error assigned, as to the overruling of his demurrer to the complaint, "stands upon substantially the same grounds" as the first error. We think that the complaint was sufficient, and that the demurrer thereto was correctly overruled.

The judgment is affirmed, with costs.

Stanton *et al.* v. The State, *ex rel.* Green *et al.*

No. 9177.

STANTON ET AL. v. THE STATE, EX REL. GREEN ET AL.

82	463
141	504

DECEDENTS' ESTATES.—*Breaches of Administrator's Bond.*—*Pleading.*—A complaint on an administrator's bond, on relation of the persons entitled to distribution, assigning as breaches: 1. That the administrator has failed to account for \$2,000 interest by him collected; 2. That he has wrongfully withheld distribution for four years, though it was demanded; 3. That he has wrongfully delayed settlement of the estate for four years, is good as to each of the breaches.

SAME.—*Harmless Error.*—Where, in a suit upon an administrator's bond, it appears from the record that no damages have been allowed upon certain breaches which had been held good on demurrer, the ruling upon the demurrer, even if erroneous, is harmless, and not available as error in the Supreme Court.

MASTER COMMISSIONER.—*Report.*—*Practice.*—*Bill of Exceptions.*—Where a cause is referred to a master commissioner to "hear and report the evidence and his finding of facts therein to the court," the report is no part of the record, unless made so by bill of exceptions or order of the court.

From the Hamilton Circuit Court.

T. J. Kape, T. P. Davis, J. Stafford and T. E. Boyd, for appellants.

A. F. Shirts, G. Shirts, W. R. Fertig, D. Moss and R. R. Stephenson, for appellees.

FRANKLIN, C.—Appellees, as heirs of John Green, deceased, brought this suit against appellants, Stanton as principal, and Manlove and Henley as his sureties, upon the administrator's bond in the estate of said deceased.

Appellant Stanton demurred to the complaint, and also severally to each breach of the condition of the bond therein assigned. The demurrer was sustained to the first alleged breach, and overruled as to the other breaches of the bond and the complaint. Appellants Manlove and Henley filed separate answers, in denial. Stanton answered separately, in three paragraphs. Reply, by denial, to second and third paragraphs.

The case, by agreement of parties, was, on the 26th day of

Stanton et al. v. The State, ex rel. Green et al.

January, 1880, referred to Joseph R. Gray, master commissioner, to hear and "report the evidence in said cause and his finding of facts therein to the court."

On the 5th of May, 1880, Gray filed his report of the evidence and his finding of the facts.

On motion of the appellees, the cause was referred back to Gray, with directions to allow the parties to make and file their objections before him, and for further action.

Afterwards, on the 16th day of November, 1880, Gray again filed his report of the evidence and finding of the facts.

Appellees then filed exceptions to the report of the commissioner, being the same that were filed before the commissioner, overruled by him and excepted to by appellees, which exceptions were sustained by the court to the 1st, 5th and 9th findings of the commissioner, and to so much of the 7th and 8th findings as allowed \$1,350 for the services of the administrator, and \$80 attorneys' fees for counsel for defendants in this suit, to which appellants excepted; and the exceptions were overruled as to the other findings in the report, to which appellees excepted; and the court modified the 5th finding and allowed the administrator \$700 for his services, and upon the issues and examination of the evidence and other findings reported by the master commissioner, found for the plaintiffs and rendered judgment thereon for the sum of \$2,405.87, and that execution be first levied upon the property of Stanton.

The appellants filed a motion, in writing, for the court to modify the judgment so as to approve and confirm the report of the commissioner, and to allow the administrator said sum of \$1,350 for his services, which motion the court overruled and the defendants excepted.

Appellants then filed a motion for a new trial, which was also overruled, and an exception reserved, and the defendants appealed to this court.

The errors assigned are:

"1st. Overruling the demurrer to the complaint and to each breach of the bond therein assigned.

Stanton et al. v. The State, ex rel. Green et al.

"2d. Sustaining the appellees' exceptions to the master commissioner's report.

"3d. Overruling appellants' motion to modify the judgment.

"4th. Overruling appellants' motion for a new trial.

"5th. Error in modifying master's report."

Appellants' counsel do not insist that the demurrer ought to have been sustained to the complaint, but claim that it should have been sustained to the 2d, 6th and 7th alleged breaches of the bond.

These breaches are substantially as follows:

2d. He has failed and refused to account for \$2,000 interest collected by him on moneys due said estate.

6th. Said Stanton has wrongfully and unjustly withheld distribution of the funds of said estate to the heirs thereof for more than four years, although he has received and held of said moneys during all of said time more than \$12,000, and although said heirs have often demanded distribution.

7th. Said Stanton has wrongfully and unjustly and without cause delayed the settlement of said estate for more than four years, to the great damage of said heirs.

We think each one of these alleged breaches of the bond shows a failure of the administrator to discharge his duty as such administrator. And the *tenth* clause of the 162d section of the act for the settlement of decedents' estates, 2 R. S. 1876, p. 551, is very comprehensive in its language; after enumerating various specified causes for which an administrator may be sued upon his bond, this clause ends the section by saying: "*Tenth*. Any other violation of the duties of his trust." Which is broad enough to include the derelictions of duty as set forth in these breaches; and we think they are sufficient to authorize plaintiffs to recover, at least, nominal damages. And there was no error in overruling the demurrer to them. And the findings of the commissioner, so far as approved by the finding and judgment of the court,

Stanton et al. v. The State, ex rel. Green et al.

and the finding of the court, show that there were no damages assessed upon either of these breaches, and if the demurrer had been erroneously overruled to them, it would have been a harmless error, for which the judgment would not be reversed. *Blasingame v. Blasingame*, 24 Ind. 86; *Keegan v. Carpenter*, 47 Ind. 597.

The 2d, 3d and 5th specifications of error are based upon rulings of the court in relation to the master commissioner's report.

It is insisted by appellees' counsel that the report of the master commissioner is not properly in the record, and that no questions in relation to it can be considered. The report is not made a part of the record by bill of exceptions, nor was it made a part of the record by order of the court, and directed to be certified by the appellants, and it is earnestly contended, that, under section 559 of the code, it could not be made a part of the record, by being certified by the clerk.

The proper solution of this question, we think, depends upon what distinctions should be made between proceedings before a master commissioner and proceedings before referees.

Under proceedings before referees, the trial of the issues, whether of fact or law, is submitted to the referees, and the trial is conducted in the same manner as a trial by the court. "The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict." 2 R. S. 1876, p. 178, section 350. See, also, section 349.

In such cases the court has no right to change and modify the report, and render judgment for any sum different from that reported by the referees. *Mitchell v. Geisendorff*, 44 Ind. 358; *Indiana, etc., R. W. Co. v. Bradley*, 7 Ind. 49; *Gilmore v. Board, etc.*, 35 Ind. 344-347.

In the case of *Reid v. State, ex rel. Frybarger*, 58 Ind.

Stanton et al. v. The State, ex rel. Green et al.

406, "by agreement of parties, the cause was referred to George B. Sleeth, master commissioner, to hear the evidence in the same, and report his finding thereon at the next term of this court." It will be observed that this reference did not require a report of the evidence, and this court held that it was a general reference under the referee act. The following language is used in the opinion of the court: "Different agencies may be entrusted with the power of determining the facts in controversy between litigants, and stating the proper conclusions thereon. A jury, a referee, or the court may perform this duty; but where the duty in the premises, imposed upon any one of these agencies in a given cause, is general, the entire duty must be performed by that agency. A jury must find a verdict upon which a judgment can be rendered. So a general referee, which, in legal effect, the referee was in this case, must make a final report upon the whole case, upon which the court must render judgment. If not such, when returned, the court, before discharging the referee, should require him to perfect his report or finding." And that it was error for the court to change the amount found by the referee, and render judgment upon the changed amount.

In such cases the report of the referee was a "paper pertaining to the cause and filed therein," and would become a part of the record, like the verdict of a jury, without a bill of exceptions, or order of the court.

Section 7 of the act of March 2d, 1853, provides that "Such master commissioners shall have the powers and discharge the duties herein mentioned which have heretofore been performed by masters in chancery, so far as the same may be consistent with existing laws."

Under the practice, therefore, the trial of the issues is not submitted to the master commissioner, by referring to him the cause to hear and report the evidence and the facts. The trial still remains before the court, and it is for the court to apply the law to the facts, make a finding thereon, and render judg-

Stanton et al. v. The State, ex rel. Green et al.

ment accordingly. The report of the commissioner is only advisory, and for the assistance of the court in coming to a conclusion, and when the evidence is reported, or required to be reported, it is not conclusive, and the court has the right to examine the facts and look into the evidence, in order to make a correct finding before rendering judgment thereon, and for that purpose exceptions to the report may be filed, pointing out any errors therein contained. It will be presumed correct until the contrary is shown. Under the old practice, the evidence had to accompany the facts in order to sustain them; but, since the adoption of the R. S. of 1843, it is not necessary to report the evidence unless so ordered in the reference, or requested by either of the parties, and when so reported it may be used for the purpose of impeaching or sustaining the report of the facts. *McKinney v. Pierce*, 5 Ind. 422; *Shaw v. Kent*, 11 Ind. 80.

In the case of *McGillis v. Slattery*, 52 Ind. 44, the submission was nearly identical with the one under consideration, and reads as follows: "And, by agreement, this cause is submitted to H. S. Braden, as a master commissioner, who is to report the evidence and his findings at the next term of this court." In the opinion the following language is used by the court: "We do not think that this was, or that it can be held to be, a reference to a referee under sec. 349, 2 G. & H. 210. There was no issue or issues referred to a referee to be tried, nor was there any written consent of the parties filed. But we think it was a reference to a master commissioner under the act of March 2d, 1853, 1 G. & H. 433."

In the case of *Hauser v. Roth*, 37 Ind. 89, the cause was referred to a special master in chancery appointed by the court "to enquire into and find the facts in this cause, and report the same, with his conclusions of facts thereon, to this court." WORDEN, C. J., after quoting the statute in relation to the appointment and duties of master commissioners, says: "The reference of a cause to a master to enquire into and find

Stanton et al. v. The State, ex rel. Green et al.

the facts in the cause, with directions to report the same to the court, as was done in this case, implies a trial of the cause by the court, and not by a jury. Such reference is a mere mode of enabling the court to arrive at the facts."

In the case of *King v. Marsh*, 37 Ind. 389, we find the following language: "The only questions raised are as to the report of a master. The report is no part of the record, unless made so by bill of exceptions, which is not done; and we can not, therefore, take any notice of its imperfections, it being used as mere evidence on which the court finds and renders its judgment. 2 G. & H. 273, sec. 559."

This report must, therefore, be considered as "relating to collateral matters," and not as a paper directly "pertaining to the cause and filed therein," and can not be made a part of the record except by bill of exceptions or order of the court.

We, therefore, can not consider the report of the master commissioner, nor the exceptions or motions made in relation thereto.

The 4th error assigned is the overruling of the motion for a new trial.

The 3d, 4th, 5th and 6th reasons for a new trial have reference to the rulings of the court in relation to the report of the commissioner, and can not be considered, for the reason that the report is not properly in the record.

The other reasons are:

"1st. The finding and judgment is contrary to law.

"2d. The finding and judgment is contrary to the evidence.

"7th. The finding and judgment is not supported by sufficient evidence.

"8th. The finding and judgment is excessive."

The evidence, being a part of the report of the commissioner, and that not being properly made a part of the record, is not before us, and these reasons can not be considered in the absence of the evidence. There was no error in overruling the motion for a new trial.

Schwarm v. The State.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is in all things affirmed, with costs.

No. 10,185.

SCHWARM v. THE STATE.

LIQUOR LAW.—*License*.—A license to retail intoxicating liquors for one year, granted on the first day of September, but not received and paid for until the third day of that month, will not include and protect sales made by the licensee on the fourth day of September, of the following year.

From the Tippecanoe Circuit Court.

A. Parsons, for appellant.

D. P. Baldwin, Attorney General, and *W. W. Thornton*, for the State.

ELLIOTT, J.—The appellant prosecutes this appeal from a judgment convicting him of the offence of selling liquor without a license.

It is contended that although the license was granted on the first day of September, 1879, yet as it was not received and paid for until the third day of that month, it will include and protect sales made on the fourth day of September of the following year. Assuming, but not deciding, that the license became operative from the time the fee was paid, it will not extend to and embrace the fourth day of September, 1880.

There is evidence fairly supporting the verdict, and a well settled rule of practice forbids us to disturb it.

Judgment affirmed.

 Willson et al. v. Brown et al.

No. 9392.

WILLSON ET AL. v. BROWN ET AL.

SUBROGATION.—*Purchaser at Auditor's Invalid Sale of Land Mortgaged to School Fund.*—The purchaser of land sold by an auditor under a school fund mortgage, the sale having been set aside as invalid, may be subrogated to the rights of the State in the mortgage.

SAME.—*Mistake in Description.*—The fact that there was a mistaken description in a school fund mortgage, if the mistake was such as could have been corrected at the suit of the State, does not affect the right of subrogation on the part of the purchaser at a sale under the mortgage, upon the sale being set aside as invalid.

CONVEYANCE.—*Description Made Good by Reference.*—A defective description in a deed or mortgage is made good by a reference to another deed which contains a true description.

SAME.—*Public Policy.*—*Judicial Sale.*—*Volunteer.*—*Equitable Relief.*—Public policy forbids that a purchaser of land sold by virtue of a decree, judgment or other lien, should be deemed to be a volunteer, and be denied equitable relief, in case of the invalidity of the sale, merely because he had no personal interest to protect, and purchased for the sake of the investment only.

SAME.—*Caveat Emptor.*—The doctrine of *caveat emptor* applies to the purchaser at an invalid judicial sale or sale by a public officer, in respect to any claim for recourse upon the party for whose benefit the sale was made, but not so as to deny a remedy against him whose debt has been, as to his creditor, paid or extinguished.

From the Grant Circuit Court.

I. VanDevanter and J. W. Lacey, for appellants.

A. Steele and R. T. St. John, for appellees.

WOODS, J.—The circuit court sustained the several demurrers of the defendants to the complaint of the appellants, for the want of facts stated sufficient to constitute a cause of action, and, the appellants abiding by their exception, gave judgment against them.

The ruling upon the demurrers is assigned as error.

The substance of the complaint is that the defendant Brown, who had purchased and received a deed of conveyance of certain school land particularly described, made his note and mortgage to the State of Indiana for \$500, for the benefit of

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Willson *et al.* v. Brown *et al.*

the school fund; "that, by a mutual mistake of fact on the part of the parties to said mortgage," the land was therein erroneously described as "a part of Broad Ripple Float, section No. 1," etc., "being the tract deeded to John H. Brown, by E. Kitch, trustee," said Brown being the defendant of that name, and the land so conveyed to him by Kitch, trustee, being the land first described in the complaint as intended to be described in the mortgage; that Brown afterwards conveyed the land to the defendant Oatess, who afterwards conveyed the same to the defendant Nelson, said grantees each being cognizant of all the facts, and each, as a part of the purchase price of the land, having agreed with his grantor to assume and pay said note and mortgage; that, on the 24th day of March, 1879, the plaintiffs purchased the land at an auditor's sale thereof made upon said mortgage, paying therefor the full amount of the mortgage, damages and costs, to wit, \$551.43, which sale was afterwards, on the complaint of the defendant Brown, in the Grant Circuit Court, which had jurisdiction in the action, set aside, declared void and held for naught. Wherefore the plaintiffs pray that they be subrogated to the rights of the State in said mortgage, etc.

The principal objection urged against the sufficiency of the complaint, which is that the plaintiffs were volunteers, occupying no such relation either to the mortgage debt or the property sold as to entitle them to be subrogated to the rights of the State, may be regarded as fully answered by the case of *Muir v. Berkshire*, 52 Ind. 149. We are not disposed to restrict the scope of the decision in that case. A sound public policy forbids that a purchaser at a public sale, who has in good faith paid the amount of his bid, in discharge of the decree, judgment or other lien by virtue of which the sale was made, should be deemed a mere volunteer and should be denied any equitable relief in case the sale proved to be invalid, merely because he had no personal interest to protect and made the purchase for the sake of the investment only.

Willson *et al.* v. Brown *et al.*

Bidding should be encouraged, to the end that property may not be sacrificed for less than its worth.

As was said in *Muir v. Berkshire*, so it may be said in this case: "The sale under the mortgage having judicially been held void, the relation of the land to the mortgage remains the same as if no sale had been made. The question, then, in the case is, who stands in the place of the mortgagee?" And as in that case, so in this, it can not be the mortgagee, because, as to the State or the school fund, the mortgage was paid by the proceeds of the invalid sale. Justice and good conscience declare in favor of the appellants, who made the payment, and must otherwise lose their money.

While the doctrine of *caveat emptor* has its proper application to the purchaser at such sale, and puts him on enquiry as to the extent and character of the title which he obtains, so that he can have no recourse against the party for whose benefit the sale has been made, its application is not such as to cut off all remedy against the debtor whose debt is extinguished, if the sale prove entirely invalid and is set aside, as in this case.

Much stress is laid by counsel for the appellee upon the alleged mistake in the description of the land contained in the mortgage. They insist that the mistake, as pleaded, is one of law, rather than of fact, and, assuming that the description in the mortgage is absolutely void for uncertainty, contend that there was no sale of the land to the plaintiffs, and so they can not be in a position to claim the benefit of the doctrine of subrogation; that the cases "will all assert the doctrine, that where subrogation under a written instrument has been decreed, it was of a valid, and not of a void, instrument."

It will hardly do, as we think, to call a mortgage void because by mutual mistake of the parties it contains a mistaken and meaningless description, if that mistake is such as the mortgagee may have corrected. Equity treats as done what ought to be done, and consequently such mortgage, as between the parties and as to all who have notice, is a valid

Hoffman *et al.* v. Rothenberger.

lien upon the land intended to be described. If, therefore, the mortgagee may have the mistake corrected and then enforce the mortgage, one entitled to be subrogated may, it would seem plain, have the same relief.

It is not necessary, however, as this case is now presented, to consider this question. Upon the facts stated in the complaint there is no mistake in the description which needs correction. The description given in the mortgage, though in itself plainly defective, is followed by the statement: "Being the tract deeded to John H. Brown by E. Kitch, trustee;" and it is alleged that that tract is the land intended to have been described in the mortgage. This makes the description sufficient, for that is certain which can be made certain. One deed may refer to another for a description of the premises.

It follows that so much of the complaint as alleges a mistaken description is, upon the face of the pleading, unnecessary and may be rejected as surplusage; and the statement of the correct description of the land may be regarded as unimportant, except as, if proven, it would enable the court to embody a complete description in its decree, instead of making only a reference to the deed where it could be found.

Judgment reversed, with costs, and with instructions to overrule the demurrers to the complaint.

No. 9335.

HOFFMAN ET AL. v. ROTHENBERGER.

PRACTICE.—Additional Pleadings.—Discretion of Trial Court.—Pleading.—

The right of a party to file additional pleadings after the issues have been closed is not absolute, but is controlled by the discretion of the trial court.

SAME.—Supreme Court.—Proper Cause Must be Shown by Record.—A party complaining in the Supreme Court that his motion for leave to file additional answers was denied, must present a record showing that proper cause for his motion was brought before the trial court.

Hoffman *et al.* v. Rothenberger.

From the Clinton Circuit Court.

R. P. Davidson, J. Claybaugh and B. K. Higinbotham, for appellants.

A. E. Paige and S. O. Bayless, for appellee.

ELLIOTT, J.—After the issues in the case had been closed, the appellants, who were the defendants below, moved the court for leave to file additional answers; their motion was denied, and of this ruling they here complain.

A party has not a right as of course to file additional pleadings after the issues are closed. In the matter of permitting or refusing amendments after the issues are fully made up, the trial courts have broad discretionary powers, and their action will be reviewed only in cases where it is made to clearly appear that injustice has been done. It is incumbent upon a party who asks leave to file additional pleadings, to show some cause for his motion; otherwise the court may rightfully deny it. When an appellant asks this court to review the rulings of an inferior court refusing leave to file additional pleadings after issues joined, he must present a record showing that proper cause for his motion was brought before the trial court.

The record before us does not show that any cause was submitted to the consideration of the court below in support of the application to file additional answers. It is true that the clerk states, by way of recital, that an affidavit was filed, and it is also true that a paper purporting to be an affidavit is copied in the transcript. We can not regard this paper as any part of the record. Such papers as affidavits in support of motions for leave to amend, for continuance, to set aside defaults, and like matters, can only be brought into the record by a bill of exceptions or order of the court.

In this case there is no bill of exceptions, and no order of the court, and the paper professing to be an affidavit in support of the application for leave to amend is not in the record.

Judgment affirmed.

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

No. 9475.

THE PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY
COMPANY v. MARTIN.

NEGLIGENCE.—Complaint.—Railroad Crossing.—Highway.—A complaint against a railway company for injury to the plaintiff at a highway crossing, which avers that the defendant negligently caused its trains of cars to pass the crossing at unusual speed, and negligently omitted to give any timely signal of its approach by bell or whistle at a proper distance, by reason whereof, etc., is sufficiently specific as to the defendant's negligence.

SAME.—Instruction.—An instruction, that a failure of a railway company to sound the whistle at least eighty rods before reaching a highway crossing (the act of 1879, Acts 1879, p. 173, being in force) was negligence, and if by reason thereof the plaintiff was injured, without negligence on his part, the verdict should be for the plaintiff, was held correct.

SAME.—Contributory Negligence.—While the statute of 1879 was in force, a violation of it was negligence; and where the evidence showed this, an instruction, that if there were obstacles to prevent the seeing of an approaching train until the plaintiff got near the railroad, it was his duty to stop before reaching it, and look and satisfy himself that no train was approaching, and if he did not, but by so doing he could have seen the train, he was negligent, and could not recover, was properly refused.

PRACTICE.—Amendment.—Parties.—A complaint may be amended before answer and without leave, by substituting a different person as plaintiff.

SAME.—Verdict.—Special Findings.—In considering a motion for judgment on special findings, notwithstanding a general verdict, no reference can be had to the evidence given, but if by any conceivable evidence admissible under the issues, the special findings can be reconciled with the general verdict, the motion should be denied.

SAME.—Argument of Counsel.—Discretion of Court.—After the close of the evidence, one of the plaintiff's counsel addressed the jury, whereupon the defendant's counsel being, on inquiry, told by the associate counsel for the plaintiff, that he did not wish to say anything in the opening, declined to make any answer, whereupon said associate, over the defendant's objection, also addressed the jury, and then the defendant's counsel declined to argue.

Held, that the discretion of the court was not abused, and there was no error.

SAME.—Improper Remarks.—Improper remarks of counsel in argument, to which no objection is made at the time, will not warrant a new trial.

INSTRUCTIONS.—When the court has given an instruction, substantially such as a party asks, it may refuse the latter.

From the Howard Circuit Court.

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The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

N. O. Ross, for appellant.

J. W. Kern, for appellee.

BICKNELL, C. C.—This was a suit, by the appellee against the appellant, to recover damages for a collision.

The plaintiff recovered six hundred dollars; the defendant appealed.

The first error assigned by the appellant is, that the court refused to strike out the amended complaint. The complaint had been amended by substituting Henry Martin for John Martin as plaintiff; this was done before the complaint was answered and without obtaining leave of court therefor.

Amendments, made after answer, require leave of court, but any pleading may be amended, of course, before it is answered. Civil Code, section 97.

In *Hubler v. Pullen*, 9 Ind. 273, the court below had permitted, after answer, an amendment of the complaint by the substitution of two new plaintiffs in place of the original two. This court sustained that action, and said: "By the mere change of names, the cause of action stated in the complaint could not be substantially varied." If such an amendment can be made, by leave of court, after answer, it may, under section 97, *supra*, be made of course, before answer. There was no error in this particular.

The second assigned error is, that the court erred in overruling the motion that the complaint be made more specific, by stating in what the negligence and carelessness, complained of, consisted.

The complaint avers, that, as the plaintiff "reached the said crossing, the defendant negligently and carelessly caused one of its locomotives, with a train of cars attached thereto, to approach said crossing, and then and there to pass, at a great and unusual rate of speed, over the track of said railroad, and without proper care, and negligently and carelessly, omitted, while so approaching said crossing, to give any reasonable, proper or timely signal, by ringing the bell, or sounding the

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

steam whistle, at a reasonable and proper distance from said crossing; by reason whereof he was unaware of its approach, and by reason of said negligence and carelessness of said defendant, and without any fault on his part, the said locomotive struck his wagon on said crossing," etc.

This was sufficiently specific. *Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471 (17 Am. R. 719). There was no error in this particular.

The third assigned error is that the court erred in overruling the demurrer to the complaint. The demurrer was for want of facts sufficient, etc. The complaint was sufficient. *St. Louis, etc., R. W. Co. v. Mathias*, 50 Ind. 65; *Toledo, etc., R. W. Co. v. Shuckman*, 50 Ind. 42; *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168.

The fourth assigned error is that the court overruled the defendant's motion for judgment on the special findings, notwithstanding the general verdict for the plaintiff.

The answer to the complaint was the general denial. The general verdict was for \$700. The special findings were as follows:

"1. Is the plat or drawing hereto annexed a correct representation of the crossing of the highway by the railroad at the point where the injury complained of was inflicted? Ans. In part.

"2. Did the plaintiff approach the crossing, travelling along the highway, coming from the east? Ans. Yes.

"3. Was the train that inflicted the injury approaching the crossing from the southeast? Ans. Yes.

"4. Was the vision obstructed at the time, so that the plaintiff, coming along the highway from the east, could not see the train approaching from the southeast, until he came up near the crossing? Ans. Yes.

"5. At what distance from the railroad track, where the highway crosses it, could the plaintiff, approaching from the east, first see a train of cars approaching from the southeast along the railroad track? Ans. Ten steps.

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

"6. Does the railroad, running southeast from the crossing, run through a cut? Ans. Yes.

"7. If you answer question 6 in the affirmative, then how far does it run through said cut from said crossing, and what is the depth of the cut? Ans. About forty rods; from three to twelve feet.

"8. Was the plaintiff hard of hearing at the time of the accident? Ans. No.

"9. Did plaintiff look for the train in the direction from which it was coming, before he drove his team upon the crossing? Ans. Yes.

"10. If you answer question 9 in the affirmative, how far was his team from the crossing when he looked? Ans. About two feet.

"11. How far was the locomotive from the crossing when the plaintiff first saw it? Ans. About ten rods.

"12. At what rate of speed was the train running at the time? Ans. About twenty-five miles per hour.

"13. Did plaintiff know of the existence of the railroad, and the direction in which it ran? Ans. Yes.

"14. Was the whistle sounded as the train approached the crossing at the time of the accident? Ans. No, except two quick, sharp sounds.

"15. Could the engineer have prevented the collision after he saw the approach of the plaintiff? Ans. No.

"16. What means did the plaintiff use to escape the danger after he saw it? Ans. By rising to his feet and applying his whip to his horses.

"17. How much of the plaintiff's damages do you allow for his suffering caused by the injury? Ans. \$200.

"18. How much for loss of time in getting cured? Ans. \$100.

"19. How much for expenses during his illness, caused by the injury, and in getting cured of it? Ans. \$100.

"20. How much do you assess for loss of ability to labor? Ans. \$300.

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

"21. For how many years do you estimate his loss of ability to labor, and how much per year? Ans. Three years, at \$100 per year.

"22. What was the plaintiff's age at the time of the injury? Ans. Seventy-one years."

The plaintiff remitted \$100 of the verdict, to wit, the sum mentioned in the answer to interrogatory No. 19, as allowed for expenses in getting cured of his injuries.

The appellant claims that the special findings show negligence in the appellee:

1st. In not looking for a train sooner.

2d. In attempting to cross after he saw it.

The rules which govern motions for judgment *non obstante* are as follows:

The special findings of the jury override the general verdict only when both can not stand. Their antagonism must be apparent on the face of the record, so as to be incapable of removal by any evidence legitimately admissible under the issues; otherwise, the general verdict will control. *Scheible v. Law*, 65 Ind. 332, and cases there cited; *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168.

The court will not presume anything in aid of the special findings, but will make every reasonable presumption in favor of the general verdict. *Ridgeway v. Dearing*, 42 Ind. 157; *McCallister v. Mount*, 73 Ind. 559.

In considering the motion for judgment *non obstante*, no reference can be made to the evidence given on the trial; the question is not whether the evidence will sustain the verdict; that question belongs to the motion for a new trial. The general verdict prevails over the special findings, if there could have been, under the issues, proof of supposable facts, not inconsistent with those specially found, sufficient to reconcile the general verdict with the special findings. *Stevens v. City of Logansport*, 76 Ind. 498; *Higgins v. Kendall*, 73 Ind. 522; *Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335 (5 Am. R. 201); *Byram v. Galbraith*, 75 Ind. 134, and cases there cited.

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

Under the foregoing rules, it is clear that there is no irreconcilable inconsistency between the general verdict and the special findings. There was no error in overruling the appellant's motion for judgment, notwithstanding the verdict.

The last error assigned is, that the court erred in overruling the motion for a new trial. The first reason for a new trial is, that the court permitted the plaintiff's counsel to make a second opening argument to the jury, after the close of the evidence, and after the counsel for the defendant had declined to reply to the first opening argument after the close of the evidence. The bill of exceptions shows that one of the plaintiff's counsel, after the close of the evidence, addressed the jury, and when he had finished, the defendant's counsel asked the plaintiff's associate counsel, if he wished to say anything further in opening the case, who replied that he did not, and the defendant's counsel then declined to reply to the argument already made; whereupon the plaintiff's said associate counsel was permitted by the court, over the defendant's objection, to address the jury in continuation of the opening argument, and when he had finished, the defendant declined to argue the case.

In *Priddy v. Dodd*, 4 Ind. 84, the plaintiff's counsel addressed the jury the defendant declined to reply the plaintiff then claimed the right to close the argument, which the court refused to permit. This court, on appeal, affirmed the ruling of the inferior court, and said that such matters are much in the discretion of the trial court, and that the discretion did not appear to have been abused. STUART, J., giving the opinion of the court, said: "There is * a strong common sense in support of the action of the court. The plaintiff had already an opportunity to present his case to the jury, which the record shows he had embraced fully, and rested. If he did not put the jury in possession of his views, it was his own fault. He has but fallen into the snare he had, perhaps, spread for his opponents. It was no invasion of the rights of any one

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

for the court to hold, that the struggle thus closed could not be renewed."

Whether such a second speech be termed a continuation of the opening or a close of the argument, the substance of the proceeding is the same; it may have been an effort to gain the advantage, but the matter being in the discretion of the court below, a ruling either way ought not ordinarily to be reversed by this court.

The second reason for a new trial is that the court permitted the plaintiff's counsel to speak of the defendant as a gigantic corporation owned by Tom Scott, having its employees in court, branded on their backs with the letters P. C. & St. L.

The record does not show that the defendant's counsel objected to such remarks when they were made, or called upon the court to stop them. If the court, on a proper request, had refused to interpose and put a stop to improper remarks, an exception to such refusal would have been available, but where such remarks are permitted to be made, without objection, and without calling upon the court to interfere, the impropriety of the language will not warrant a new trial. *St. Louis, etc., R. W. Co. v. Myrtle*, 51 Ind. 566, and cases there cited.

The third reason for a new trial is, that the court erred in giving to the jury, of its own motion, instruction No. 2, which is as follows:

"It was the duty of the engineer, or those in charge of the train, on approaching a highway, to sound the whistle on such engine, at least eighty rods before reaching said crossing, and if they failed to do so, and accident and injury occurred therefrom, this would be negligence on the part of such railway company, and if you believe, from a preponderance of the evidence, in this case, that the defendant, by her employees running the train from which said accident occurred, failed to so sound said whistle, and by reason of such failure said ac-

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

cident occurred, without negligence on the part of the plaintiff, then, in that case, you should find for the plaintiff."

The complaint averred in substance, amongst other matters, that when the plaintiff, travelling on the highway in a two-horse wagon, reached the crossing place of the railroad, at and in the village of Tarry Hall, the defendant, coming with the engine and cars toward that crossing, from the southeast, carelessly and negligently omitted to give any reasonable, proper or timely signal of its approach, whereby, etc., without any fault of the plaintiff, etc. There was evidence tending to sustain these averments, and to show that the engine, coming to the crossing at the rate of twenty-five miles an hour, gave no notice whatever of its approach, except two quick, sharp sounds of the whistle, when about 100 feet from the crossing.

The injury occurred in April, 1880. The law then declared what should be a reasonable, proper and timely signal in such a case. By the act of March 29th, 1879, Acts 1879, p. 173, the defendant was required, when distant eighty rods from such a crossing, to sound its whistle continuously until the crossing should be fully passed, and a neglect to do so was made a misdemeanor in the person having charge of the engine.

The court was bound to take notice of this law. The plaintiff had a right to believe the defendant would obey it. The plaintiff's view was partially obstructed; the track, for forty rods from the crossing, going southeast, was in a cut from three to twelve feet deep; the instruction under consideration informed the jury, in substance, that the violation of such a statute was negligence, and that if, from a preponderance of the evidence, they believed such negligence existed, and had produced the injury, without any contributory negligence of the plaintiff, they should find for the plaintiff.

While such a law existed, a violation of it was undoubtedly a failure to give reasonable, proper and timely notice. The signal required by the law not being given, the view being obstructed, and the plaintiff not being hard of hearing, he had no reason to suppose that the train was within eighty rods

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

of the crossing; he was misled by the defendant's negligence in omitting the proper signal; he was not guilty of negligence in assuming, in the absence of any indication to the contrary, that the company was obeying the law, and that no engine was advancing toward the crossing within a distance of eighty rods. *Kennayde v. Pacific R. R. Co.*, 45 Mo. 255; *Tabor v. Missouri Valley R. R. Co.*, 46 Mo. 353 (2 Am. R. 517); *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9; *Ernst v. Hudson River R. R. Co.*, 39 N. Y. 61.

We think there was nothing in instruction No. 2, given by the court of its own motion, of which the defendant had a right to complain.

The fourth reason for a new trial is the refusal of the court to give to the jury instructions asked for by the defendant; these instructions were numbered from 1 to 11; of these, numbers 1, 10 and 11 are not mentioned in the appellant's brief, and the objections thereto are regarded as waived.

No. 2 is discussed in the appellant's brief as No. 3, and is as follows:

"2. If you find that there were obstructions that prevented the plaintiff from seeing an approaching train, until he got near the railroad track, there was a greater necessity to satisfy himself that no train was approaching before attempting to cross, and, if necessary, it was his duty to stop his horses and look for approaching trains before entering upon the track; and if you find he failed to do so, and might have seen the train if he had, he was guilty of negligence, and can not recover."

This instruction was properly refused. It has been held repeatedly, that inability to use eyesight or hearing, ordinarily, demands more diligent exercise of the remaining sense, and the court had told the jury in its own instruction, No. 4, that if the plaintiff was hard of hearing, there was a greater necessity that he should use his eyesight to avoid danger, and had also told the jury in its own instruction,

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

No. 6, that if the plaintiff, by looking, could have seen the train approaching before he entered upon the track, and could thereby have avoided the accident, then both parties were guilty of negligence, and they should find for the defendant. It was said by this court in *Terre Haute, etc., R. R. Co. v. Clark*, 73 Ind. 168: "There is no rule which requires a man with a team to stop still. It would in many cases, perhaps, be impossible to do so, and, under supposable circumstances, it would not be necessary to stop, either to look or listen." In the present case, there was evidence tending to show that the train could not be seen coming from the southeast until the plaintiff was within thirty feet of the track; that immediately afterwards he heard the two sharp, quick whistles, and saw the train; that his horses' forefeet were then over the first rail, and the train within a hundred feet of the highway, coming at the rate of twenty-five miles an hour, at least thirty feet in a second. It was no time to stop horses then; the plaintiff, no signal having been given, was lawfully there, and there was no evidence tending to show that he could have backed or turned on that ground, in time to avoid the collision. There was no error in refusing the instruction No. 2, asked for by defendant. The appellant cites the case of *Terre Haute, etc., R. R. Co. v. Clark, supra*, but that is a very different case; there the usual signal had been given, and the plaintiff had driven his horses in a brisk trot, for forty yards, just before reaching the crossing where the train struck him.

Instruction No. 3, asked for by the defendant, was given by the court.

Instruction No. 4, asked for by defendant, was substantially given by the court in its own instruction No. 4.

Instruction No. 5, asked for by the defendant, was given by the court.

Instructions Nos. 6 and 7, asked for by the defendant, were substantially embraced in the court's own instruction No. 6, which was as follows: "If you find that the defendant was

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

guilty of negligence in failing to sound the whistle and ring the bell, and that the plaintiff, by looking, could have seen the train approaching, before he entered on the track, and thereby could have avoided the accident, then both parties were guilty of negligence, and you should find for the defendant."

Instruction No. 8, asked for by defendant, is as follows: "If you find that the defendant did not sound the whistle for eighty rods continuously, before crossing the highway, when the accident occurred, yet the plaintiff is not entitled to recover, if you find that he could have seen the cars before he entered upon the track, and if he could not see the train until near the track, there was a greater necessity for him to stop, *if necessary*, and look in the direction from which the train was coming before driving upon the track."

This instruction was also properly refused. If, as the evidence tended to show, the plaintiff could not hear the train because there was no signal, and could not see the track because of obstructions, and did not know there was a train within five miles in any direction, it would only mislead and confuse the jury to tell them that the plaintiff was bound, if necessary, to stop and look in the direction in which the train was coming.

The only remaining instruction, asked for and refused by the defendant, and referred to in the appellant's brief, is the instruction numbered 9, which is as follows:

"If you find that the plaintiff, when within thirty feet of the crossing, by looking in the right direction, could have seen the train coming, and failed to do so, he can not recover."

We think this instruction ought not to have been given. The court had already told the jury in its own instruction No. 6, that if the plaintiff, by looking, could have seen the train approaching before he entered upon the track, and *could thereby have avoided the injury*, then both parties were guilty of negligence, and they should find for the defendant.

The Pittsburgh, Cincinnati and St. Louis Railway Company v. Martin.

Under the authorities hereinbefore cited, there was no error in refusing any of the instructions asked for by the defendant and refused by the court. See *Continental, etc., Co. v. Stead*, 95 U. S. 161.

The instructions given, taken together, were more favorable to the appellant than the law strictly required.

The only remaining cause for a new trial, which is discussed in the appellant's brief, is, that the verdict is not sustained by sufficient evidence.

The jury have found by their verdict, that the negligence of the appellant caused the injury complained of, and that there was no negligence of the appellee contributing to said injury. These were questions for the consideration of the jury. *Craig v. New York, etc., R. R.*, 118 Mass. 431; *Peoria, etc., R. R. Co. v. Siltman*, 88 Ill. 529. There being testimony tending to support the verdict, this court can not reverse the judgment on the weight of the evidence. *Abshire v. Williams*, 76 Ind. 97; *Talbott v. Kennedy*, 76 Ind. 282; *Locke v. Falk*, 76 Ind. 520. But we think the verdict is right upon the evidence. It does not appear that the plaintiff could have secured safety by stopping and trying to back or turn his team, when first he discovered the train, but if it did so appear, it would not change the result, under the circumstances of this case. When a railroad company, by its own negligence, misleads a traveller, and puts him in peril of his life, and the traveller in the excitement of that peril, and in his honest efforts to escape, makes a mistake, and is injured, such an error of judgment is not contributory negligence.

The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

Nichols v. Nowling et al.

No. 10,008.

NICHOLS v. NOWLING ET AL.

TORTS.—*Tortfeasors.*—*Contribution.*—*Contract.*—*Consideration.*—*Promise.*—

There is no implied duty of contribution between tortfeasors, and, if a valid promise therefor can be made, there must be a consideration other than the fact of the tort and the relation of the accused parties to each other in the transaction; the promise of one who admits his own guilt to repay another whatever sum may be recovered of him by the injured party, made in consideration solely of the innocence of the promisee and of the guilt of the promisor, is not binding.

PLEADING.—*Contract.*—*Consideration.*—A pleading, based upon an agreement which does not express or import a consideration, should allege what the consideration was.

From the Washington Circuit Court.

S. B. Voyles and *H. Morris*, for appellant.

D. M. Alsbaugh and *J. C. Lawler*, for appellees.

WOODS, J.—The circuit court sustained a demurrer for want of facts to the appellant's complaint. The second paragraph of the complaint, to which alone the briefs are addressed, charges, in substance, that the appellee William Nowling committed an unlawful assault and battery upon James J. Rutherford, and, in order to avoid prosecution and a suit for damages, for which he was liable, left the State, and went to Missouri; that thereafter Rutherford brought a suit for damages against the defendant and this plaintiff, together with others; that the defendant, not having been served with process, did not appear to the action and make defence for himself, but while the suit was pending, and after being informed by the plaintiff that it was pending, and after the plaintiff had been served with process, wrote and delivered to the plaintiff a letter, a copy of which is filed as a part of the complaint, whereby, in consideration of the plaintiff's innocence of participation in the offence, and in consideration of his own liability for said damages, which were then unliquidated, he promised and agreed to indemnify the plaintiff for any sum which he should have to pay on account of said suit; that

Nichols v. Nowling *et al.*

after receiving the letter containing said agreement, the plaintiff accepted the agreement, and, acting upon it, hired attorneys, and used every legitimate means of defence against the action, and yet, though innocent of the charge, Rutherford obtained a judgment and execution against him, upon which he was compelled to pay the sum of \$500 which sum is now due from the defendant; wherefore, etc.

So much of the letter referred to as is relevant is of the tenor following, to wit:

“October 25th, 1874.

“MR. JOHN F. NICHOLS:

“*Dear Friend.*—I received your kind letter the other night.
* * * I am sorry, John, to think that Jack is trying to get damages of you and Sam, when you didn't do a thing; I would swear that any time. If it costs you anything, I will pay every cent you have to pay, for you were not to blame. I respect you as a friend. * * * * *

“WM. NOWLING. Good-by, John.”

It appears from the briefs, that the demurrer was sustained upon the view that the alleged contract was without consideration. We are of the same opinion. No consideration is expressed, as such, in the letter. The innocence of the plaintiff is acknowledged; there may be an inference of the defendant's guilt, though it is not directly stated. The friendly respect of the defendant for the plaintiff is avowed, so that the motive which impelled the defendant to make the promise is shown; but the motive for a promise is ordinarily quite a different thing from the consideration.

The consideration not being expressed nor implied in the writing which contains the promise, by a familiar rule of pleading, it was necessary to allege what it was. It is averred to have been the innocence of the promisee, and the guilt of the promisor, of a tort, for which an action had been commenced against the former, and to which the latter, named as a defendant in the complaint, was not a party in fact, because he had fled beyond the process of the court. If it were averred

Boatman v. Macy.

that the promise of the defendant had been made in consideration that the plaintiff should defend the action to the best of his ability, and pay whatever judgment should be rendered against him, thereby discharging the defendant from his liability to the injured party, it may be that the one undertaking would have been a sufficient consideration for the other. We decide nothing on this point; but for all that is alleged in the complaint, the plaintiff was bound by no promise or undertaking, and was at liberty to make any compromise or adjustment with the injured party which he should choose to enter into, even though it left the defendant yet liable.

There is no implied obligation to contribute between tortfeasors, and if such liability can be created by express promise, the promise must rest upon some other consideration than the fact of the tort and of the relation of the accused parties to each other in the guilty transaction; and in this respect we do not perceive that it makes any difference that the plaintiff is alleged to have been innocent and the defendant guilty. There must be some new consideration, such as mutual promises, the transfer of some value, the deprivation of some right or advantage, or the like, which the law recognizes as constituting a valid consideration.

If there was in this case any such consideration, it is not alleged in the complaint, and not being expressed in the writing sued on, it was necessary that the averment be made. The ruling complained of was therefore right.

Judgment affirmed, with costs.

No. 9658.

BOATMAN v. MACY.

DRAINAGE.—*Description of Land Assessed.*—A ditch assessment must describe the land with such certainty that it may be definitely ascertained and located. "A part" of a certain parcel of land is too indefinite to

Boatman v. Macy.

enable any one to ascertain what was intended, and such description renders an assessment void.

SAME.—Complaint to Enforce Assessment.—A complaint to enforce a ditch assessment is not good as a complaint in assumpsit, where it avers that the defendant neither requested the work done nor promised to pay for it.

ESTOPPEL.—Practice.—A party is not estopped to insist upon such defences as arise upon a demurrer to the complaint.

From the Hamilton Circuit Court.

T. J. Kane and T. P. Davis, for appellant.

D. Moss, R. R. Stephenson and W. S. Christian, for appellee.

BEST, C.—This action was brought by the appellant against the appellee, to enforce a ditch assessment made in pursuance of the act of March 13th, 1879.

The complaint consisted of two paragraphs, to each of which a demurrer was sustained, and this ruling is assigned as error.

The principal objection urged to each paragraph is that the description of the land assessed is so indefinite that the assessment is void. The land assessed is thus described: "And a part of the w. $\frac{1}{2}$ of the s. w. $\frac{1}{4}$ of sec. 35, t'p 20, range 3, owned by William Macy; amt. \$50."

The assessment is the foundation of the action, and as the lien is in the nature of a mortgage, the land must "be described with such certainty that it may be definitely ascertained and located." *Howell v. Zerbee*, 26 Ind. 214. *Gossett v. Tolen*, 61 Ind. 388; *Busenbark v. Etchison D. A.*, 62 Ind. 314.

"A part" of a certain parcel of land is too indefinite to enable any one to ascertain what was intended, and, therefore, such description renders the assessment void. *Howell v. Zerbee*, 26 Ind. 214; *White v. Hyatt*, 40 Ind. 385; *Spahr v. Schofield*, 66 Ind. 168.

This objection applies to both paragraphs of the complaint, and is fatal to them.

The appellant, however, insists that though the description of the premises is so indefinite as to render the assess-

Boatman v. Macy.

ment void, yet such facts are averred in the second paragraph of the complaint as render the appellee liable in assumpsit for the value of the labor done in constructing the ditch through his premises. We are not inclined to adopt this version of the pleading. The purpose of both paragraphs seems to have been the enforcement of a lien, and not the recovery of a personal judgment. The additional facts averred in the second paragraph of the complaint are, in substance, these: That the appellee did not appeal from the assessment; that he stood by and saw the work done without objection; that the course of the ditch through his premises was changed at his instance; that \$100 was expended for his benefit in constructing the ditch through his land, and that he did not question the legality of the assessment till after the work was completed. It is not averred that he either requested the work to be done or that he promised to pay for it, and in the absence of such averments the paragraph is not good as a complaint in assumpsit for work and labor done. Whether a jury, from the facts averred, would infer a request, is a different question. The court cannot infer it, but it must be averred. These facts were averred, in connection with others, setting forth at great length the various steps taken in establishing and constructing the ditch, to which was attached a copy of the petition and the assessment, and we think the pleading, fairly construed, must be regarded as a complaint to enforce the assessment, and not a complaint for work and labor. These facts were averred, as it seems to us, and as it is alleged in the complaint, with a view of estopping the appellee from insisting upon the illegality of the assessment, but as it is manifest that they can subserve no such purpose, the paragraph can only be regarded as a complaint to enforce the assessment. A party can not be estopped to insist upon such defences as arise upon a demurrer to the complaint. *Harmon v. State, ex rel., ante, p. 197.*

If the appellee is indebted to the appellant for work and labor done, no recovery can be had for such service in a suit

Worley v. Harris *et al.*

upon the assessment, though the labor was performed in the construction of the ditch for which the assessment was made. In such case the assessment is not the ground of the action.

As neither paragraph was sufficient no error was committed in sustaining the demurrer to them, and, therefore, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

No. 9307.

WORLEY v. HARRIS ET AL.

TOWN.—Incorporation.—Taxes.—Injunction.—Complaint.—A complaint to enjoin the collection of taxes levied by a town which had attempted to become incorporated under the general law of 1852 for that purpose, alleged as the basis for relief, that no accurate survey and map of the territory to be embraced had been made, and that the trustees had not, before the third Tuesday of May, determined the amount of general tax for the current year.

Held, that the complaint was bad.

SAME.—Waiver of Irregularities in Incorporation.—Prescription.—The exercise of corporate powers for twenty years over a defined territory, with the knowledge of the public, no question having been made as to its authority, is a waiver of irregularities in its organization and cures inaccuracies in the original survey and map, and is conclusive evidence of its incorporation.

SAME.—Time of Levy of Taxes.—Statute Construed.—The requirement of section 3348, R. S. 1881, that the amount of general taxes shall be determined by incorporated towns before the third Tuesday of May, is, by section 3262 (a later statute), changed by necessary implication. "Determine," as used in section 3348, means to assess and levy, and this can not now be done until the county board of equalization has acted.

TAXES.—Injunction.—Complaint.—A complaint to enjoin the collection of taxes, which fails to aver that such taxes have been placed upon the duplicate, and that it is in the hands of the proper officer for collection, is bad.

From the Monroe Circuit Court.

Worley v. Harris *et al.*

*W. C. L. Taylor, G. W. Friedley, E. D. Pearson and —
Friedley, for appellant.*

J. R. East, for appellees.

MORRIS, C.—The appellant, who was the plaintiff below, commenced this suit against the appellees to restrain them, as officers of the town of Ellettsville, from collecting a certain tax.

It is stated in the complaint, that the town of Ellettsville, by its assumed and pretended officers, claimed and pretended to be a municipal corporation, organized under the act of the Legislature of the State of Indiana, approved June the 11th, 1852; that John J. Harris, Samuel B. Harris and William Hanna, appellees, are assuming to act as trustees of said town; that Columbus Wires, George W. Houston and Alonzo Falkner are assuming to act respectively, as clerk, treasurer and marshal of said town; that said pretended municipal corporation is represented as being in Monroe county, Indiana, but that no such corporation was ever organized, as provided in sections 1, 2, 3, 4, 5, 6 and 7 of said act; that no accurate survey and map were made of the territory to be embraced within the limits of such pretended town or municipal corporation, when the taxes hereinafter mentioned were levied, and attempted to be collected from the property of the plaintiff.

The complaint then states: "And the pretended board of trustees did not, before the third Tuesday in May, determine the amount of the general tax for the current year as required by section 30 of said act. And your petitioner further represents, that the pretended authorities of said pretended town are now attempting to collect said illegal tax, amounting to \$57.75, by distress and sale of the petitioner's property, and will sell the same if not restrained and enjoined by the court; that said tax is illegal, oppressive and void."

The plaintiff prays for a restraining order, a perpetual injunction, and for general relief.

The complaint was verified. A temporary restraining order was granted in vacation.

Worley v. Harris *et al.*

At the following term of the Monroe Circuit Court, the appellees appeared and demurred to the complaint. The demurrer was overruled. They then answered in one paragraph. The answer stated, that immediately upon the return of the township assessor of Richland township, in which the town of Ellettsville is situate, and the returns of all the assessors of Monroe county, in which said town was located, and immediately after the equalization of said assessment by the board of equalization, one Columbus Wires, who was the duly elected and acting clerk of the town of Ellettsville, on the — day of June, 1880, transcribed from the assessor's book of said Richland township, as it then appeared in the auditor's office of said county; that said assessment, so transcribed by said clerk, was duly placed on the tax duplicate of said town; that the same was a full and accurate list of all the taxable property of said town. It is further alleged, that the assessment so transcribed was, by the defendants acting as trustees of said town, ordered and declared to be the assessment of said town for the year 1880. Wherefore they demand judgment.

The appellant demurred to the answer. The demurrer was overruled, and, the appellant declining to plead further, final judgment was rendered for the appellees.

The grounds upon which the appellant objects to the tax are: 1st. That the town of Ellettsville was not organized according to the 1st, 2d, 3d, 4th, 5th, 6th and 7th sections of the act of 1852; 2d. That the board of trustees of the town did not determine before the third Tuesday in May the amount of the general tax for the current year.

The appellant does not, in argument, seriously object to the tax on the first ground. He says: "We do not think it necessary to argue whether, under the allegation of the complaint, the alleged municipal corporation was ever a *de facto* corporation, or whether the rule recognizing the acts of a *de facto* corporation as valid will extend to injunction proceedings instituted by a member or a part of the corporation." This part of the complaint is unanswered.

Worley v. Harris *et al.*

It is not averred in the complaint at what time the town of Ellettsville attempted to organize as a corporation under the law of 1852. This law had been in force for more than twenty-five years before the commencement of this suit. Under the law, the town of Ellettsville might have become a valid corporation. It is shown by the complaint to have attempted to organize as a municipal corporation under this law, and it is plainly inferable from the facts stated in the complaint, that it had been exercising corporate powers. How long it had been exercising such powers, is not stated; it may have been acting in good faith as a corporation, levying and collecting taxes, for more than twenty years, for aught that appears in this complaint. Construing the complaint fairly, we may presume that it had been acting as a corporation for many years. Under such circumstances, its right to so act can not be collaterally questioned. Irregularities in the organization of a corporation may be waived by the public, and in such case a private person at least, can not question the existence of the corporation. *White v. State*, 69 Ind. 273; *Angell and Ames on Corporations*, section 70. Besides, the territorial limits of the town may have been accurately defined by the user, or any inaccuracy in the survey and map of its territory may have been cured by the continued exercise of jurisdiction over its territories for a quarter of a century. The exercise of corporate powers over a place for twenty years, with knowledge on the part of the public, is conclusive evidence of a charter or of a corporation by prescription. *Bow v. Allenstown*, 34 N. H. 351; *Bassett v. Porter*, 4 Cush. 487; *Robie v. Sedgwick*, 35 Barb. 319; *Dillon on Municipal Corporations*, section 51; *Sherwin v. Bugbee*, 16 Vt. 439; *Smelser v. Wayne, etc., Co.*, ante, p. 417. We think that the allegation in the complaint, that no accurate survey and map of the territory embraced by the town had been made, does not show that the tax had been illegally assessed, and that the answer is bad because it fails to negative this part of the complaint. The averment does not exclude the idea that an imperfect survey and map

Worley v. Harris *et al.*

may have been made. Inaccuracies in the survey and map might be cured by user, and, in view of the facts stated in the complaint in this case, will be presumed to have been so cured.

The complaint does not state in what year the tax complained of was levied. Nor is it directly averred that any tax upon any specified or described property of the appellant was ever levied by the appellee. It may be inferred from the statement in the complaint, that "the pretended authorities of said pretended town are now attempting to collect said illegal tax, amounting to \$57.75, by distress and sale of petitioner's property," etc., that a tax had been levied by the appellee upon the appellant's property, but in what year can not be determined inferentially or otherwise.

The answer alleges that, for the year 1880, the clerk copied the township assessor's list of the taxable property of Ellettsville, and that the same was adopted by the trustees of the town, placed upon the duplicate and declared to be the assessment of the town for the year 1880.

If we assume, as we may consistently with the pleading, that this was the assessment and levy complained of, it was not void for the reason that the board of trustees of the town of Ellettsville did not determine the amount of the general tax for the current year, before the third Tuesday in May, 1880. The word "determined," as used in act of 1852, means to assess and levy the tax. *Town of Williamsport v. Kent*, 14 Ind. 306.

The act of March the 10th, 1879, which took effect upon its passage, and was in force in the year 1880, abolished the office of assessor in incorporated towns, and provided that thereafter the assessment of personal and real property, as made and returned by the township assessors to the county auditor, as now provided by law in cities and incorporated towns, shall constitute the assessment for taxation for city and town purposes. It also provides that the town clerk shall have access to the assessor's books in the auditor's office,

Eshelman v. Snyder et al.

and that he shall transcribe therefrom, on the tax duplicate, an accurate list of the taxable property assessed in each town, as it appears to have been equalized by the county board of equalization, and thereupon compute the tax levied by the town. Acts 1879, p. 15.

By this act, the time for determining the amount of the general tax for the current year is extended, by necessary implication, so as to give the officers of the town a reasonable time to examine and copy the assessor's books after the county board of equalization shall have equalized the assessments. The answer, therefore, shows that the tax for the year 1880, was not void because the amount was not determined prior to the third Tuesday in May. The answer was good enough for the complaint.

The complaint does not show that any assessment had been placed upon the duplicate of the town, nor that the duplicate had been placed in the hands of the proper officer for collection. For the want of such averments it was radically defective. *Pugh v. Irish*, 43 Ind. 415; *Brown v. Herron*, 59 Ind. 61; *Mullikin v. City of Bloomington*, 72 Ind. 161. As the answer was good enough for the complaint, there was no error in overruling the demurrer to it.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 7138.

ESHELMAN v. SNYDER ET AL.

PRACTICE.—*Exception.—Time for Filing Bill.*—An exception must be taken at the time of a decision and reduced to writing during the term, unless an order is made during such term granting further time to file a bill, and time given *until* a day named does not include that day.

SAME.—*Pleading.—Complaint Cured by Verdict.*—Under a motion in arrest, a complaint which shows a cause of action, though defectively stated, will be deemed good after verdict.

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Eshelman v. Snyder et al.

SAME.—Amendment of Pleading.—Transcript.—An amended pleading should be refiled and a docket entry made of the fact, and, in making a transcript, the pleading as amended should be set out in connection with that entry.

MILL.—Watercourse.—Artificial Stream Appurtenant to Saw-Mill.—If the owner of land, upon which he has a saw-mill, by an artificial channel, conducts water to the mill to be used in its operation, and afterwards sells and conveys the mill and the land upon which it stands, the right to the flow of water in such channel will be carried by implication as appurtenant to the mill, and a diversion of the water by the grantor will be deemed an actionable wrong.

From the Marshall Circuit Court.

J. D. McClaren, G. R. Chaney, A. C. Capron and A. B. Capron, for appellant.

M. A. O. Packard, for appellees.

WOODS, J.—We have no brief from the appellees. The appellant has attempted, by means of a bill of exceptions, to save exceptions to the overruling of his demurrer to the second paragraph of the complaint, and of his motion for a new trial. The ruling upon the demurrer was had at the May term, 1875, but an exception was not noted, and no time given for filing a bill. The trial was not had until the October term, 1877, when a verdict was returned in favor of the appellees. Without saving exceptions, or taking any time therefor, the appellant procured of the court an order extending the time for filing a motion for a new trial "until the first day of the next term." The record shows that on the first day of the next term, the motion was filed, and seven days afterward was overruled, and thereupon judgment was rendered, and an order made allowing the appellant ninety days "in which to file his bill of exceptions." At the next term, within the time so allowed, the appellant presented his bill for signature, when the court, of its own motion, and over the exception of the appellees, extended the time for another period, within which the bill was settled, signed and filed.

It is well settled, that, unless filed at the time of the ruling complained of, or at most during the term when the ruling

Eshelman v. Snyder *et al.*

was made, time must be given at that term within which the bill of exceptions may be afterwards filed, and the granting of the time must be shown by an entry of record made at the same term. *Backus v. Gallentine*, 76 Ind. 367; *Hart v. Walker*, 77 Ind. 331; *Supreme Lodge, etc., v. Johnson*, 78 Ind. 110. The bill of exceptions is available, therefore, for no purpose except to show the evidence, if even for that purpose.

Assuming that, under the circumstances, the court had power to extend the time for filing the motion for a new trial beyond the term at which the verdict was rendered, the motion in this case was not filed within the time allowed. Time *until* a day named does not include that day. *Erb v. Moak*, 78 Ind. 569.

Error is assigned upon the overruling of the motion in arrest of judgment, which presents the question whether the second paragraph of the complaint, aided by the verdict, is sufficient. We think it is. It charges, in substance, that in March, 1865, the appellant erected upon his land a steam saw-mill, and, in order to secure a water supply for the operation of the same, constructed a ditch and so changed the natural course of a stream of water as to cause it to flow near the mill, the water being necessary for the operation of the mill, and being in fact used for that purpose until diverted by the appellant; that on the 27th day of May, 1865, the appellant sold the mill and the land on which it is situated, including the artificial channel of flowing water aforesaid with all the rights and privileges thereunto belonging, and the plaintiffs Benjamin Snyder and Samuel Hoffman became the owners of the mill (Benjamin Hoffman becoming the owner of the land), and on the first day of June, 1874, took possession and commenced and continued to operate the mill until the 14th day of July, 1874, when the defendant wrongfully constructed a ditch in such manner as to cut off the flow of water to the mill, and persists in keeping the ditch open and in so preventing the flow of water to the mill; and in consequence thereof the mill can not be operated, and the plaintiffs have been damaged, etc.

Eshelman v. Snyder *et al.*

It is objected to this complaint that it does not allege that the appellant had expressly granted the water privilege claimed to the appellees, nor show how they became the owners of the mill property, nor that they claim title under the appellant or his grantees; that the property is not sufficiently described; that both the dominant and servient estates ought to be accurately described; that it is not shown that water could not be otherwise obtained.

We have given the substance of the complaint as apparently it was when first filed. The record shows that on motion of the appellant, the court ordered it made more specific, and that in obedience to the order it was made more specific, but of the amendments, or of the entire pleading as amended, the record does not profess to give a copy. Strictly, therefore, the ruling on the motion in arrest is not before us, because it does not affirmatively appear that the complaint in the record is the complaint on which the judgment was rendered. Good practice requires that when a pleading is amended in order to be made more specific or otherwise, there should be a refile of it as amended, with a distinct docket entry of the fact, and in making a transcript, the clerk should copy, not the original but the amended pleading, in connection with the proper docket entry.

Assuming that what in this instance is certified to be the original paragraph, is in fact the pleading as it was afterwards constructed under the order that it be made more certain, it must be conceded to be greatly lacking in perspicuity and in fulness of averment. There is, however, enough alleged to show a cause of action (though defectively stated) in favor of the plaintiffs against the appellant, and, this being so, the defects of statement, by a well settled and wholesome rule of practice, are deemed to be cured by the verdict. *Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110, and cases cited.

Under the facts averred, the conveyance of the land and mill carried by implication the right to the water privilege.

Bundy v. Pool *et al.*

See *Neaderhouser v. State*, 28 Ind. 257; *Farmer v. Ukiah Water Co.*, 56 Cal. 11; *Cave v. Crafts*, 53 Cal. 135; *Simmons v. Cloonan*, 81 N. Y. 557; *New Ipswich Factory v. Batchelder*, 3 N. H. 190 (14 Am. Dec. 346); *Coolidge v. Hager*, 43 Vt. 9; S. C., 5 Am. R. 256; *Baker v. Bessey*, 73 Me. 472 (40 Am. R. 377).

Judgment affirmed.

No. 9328.

BUNDY v. POOL ET AL.

SUPREME COURT.—*Assignment of Error.*—*Defect of Parties.*—A defect of parties defendants can not be taken advantage of by a specification in an assignment of errors, that the complaint does not state facts sufficient to constitute a cause of action.

SAME.—*Complaint.*—*Prayer.*—Informality or insufficiency in the prayer of a complaint is not reached by such a specification of error.

From the Grant Circuit Court.

G. W. Harvey, for appellant.

I. Van Devanter and J. W. Lacey, for appellees.

ELLIOTT, J.—The appellees' complaint is founded upon a promissory note executed to Charles Beeson, by the appellant.

There was no demurrer to the complaint, but its sufficiency is here challenged by the assignment of errors.

If it were true, as appellant asserts, that the note was transferred by delivery, and that Beeson was not made a party to answer as to his interest, the attack upon the complaint could not prevail. A defect of parties can not be taken advantage of by an assignment of errors in a case where there has been no demurrer alleging, as a cause, such a defect.

Informality or insufficiency in the prayer of a complaint is not ground for demurrer, much less for such an assignment of errors as that here relied on.

Some other objections are urged against the complaint, but

Coverdale *et al.* v. Alexander, Treasurer.

we deem it unnecessary to do more than say that they are such as would not have prevailed if presented before verdict upon demurrer, and are, of course, unavailing when presented, as they now are, after verdict and judgment.

Judgment affirmed.

No. 8749.

COVERDALE ET AL. v. ALEXANDER, TREASURER.

MARRIED WOMAN.—*Execution of Replevin Bond.—Complaint.*—In 1878 a replevin bond executed by a married woman, in this State, was, as to her, void, and in a suit upon it against her, if the complaint disclose her coverture, a demurrer to it by her is well taken.

REPLEVIN BOND.—*Jurisdiction.—Justice of the Peace.*—Where the affidavit for a writ of replevin, before a justice of the peace, fixed a value to the property which brings the cause within the justice's jurisdiction, a replevin bond taken by him is not void, though afterwards the same may be dismissed because it is disclosed on the trial that the value exceeds his jurisdiction.

SAME.—*Approval.*—The issuing of a writ of replevin by a justice of the peace upon the filing of a bond is a sufficient approval of the bond.

From the Tipton Circuit Court.

J. A. Swoveland and D. Waugh, for appellants.

R. B. Beauchamp and G. H. Gifford, for appellee.

MORRIS, C.—This suit was commenced by the appellee, as treasurer of Tipton county, against the appellants, on a replevin bond.

The complaint states, that on the — day of May, 1878, Robert P. Timberlin was the duly elected and qualified treasurer of said county; that the appellant Samuel Wheeler was and is indebted to the county of Tipton in taxes, as appeared from the tax duplicate of said county, in the sum of \$400; that W. F. Wilcox, the duly appointed deputy treasurer of said county, had levied upon certain property of the said Samuel Wheeler, which is described, for the purpose of mak-

Coverdale et al. v. Alexander, Treasurer.

ing and collecting said tax due and owing by him ; that said Wilcox took said property and placed it in the care and custody of one Eli Coverdale, one of the defendants ; that on the — day of May, 1878, the defendant Elvira Wheeler brought her action before Esq. Chase, a justice of the peace of Wildcat township, in said county, to recover said property, filing her sworn complaint against said Wilcox and Coverdale, in which said property was described, and alleged to be hers and of the value of \$150 ; that she executed her bond, payable to said Coverdale and Wilcox, in the sum of \$300, with Samuel Wheeler, Eli Coverdale and John Q. Bryant, as her sureties ; a copy of the bond is filed with and made part of the complaint ; that a writ of replevin was issued by said justice, by which said property was taken from said Coverdale and Wilcox, and delivered to said Elvira Wheeler ; that the venue of said action was changed to Liberty township, in said county, before V. C. Wisner, a justice of the peace ; that on the — day of May, 1878, the parties met before the last named justice, where the trial of the cause was commenced ; that, after hearing the testimony of the plaintiff, the justice dismissed said action, on the ground and for the reason that said property exceeded in value the sum of \$200, for which reason he had no jurisdiction ; that said justice rendered judgment against said plaintiff in said action for \$100 costs, which remains unpaid.

The breaches of the bond alleged are :

First. That the appellant Elvira failed to prosecute her suit to effect, but allowed the same to be dismissed.

Second. That she had failed to return said property.

Third. That she has failed to pay the judgment for costs.

It is averred that Timberlin's term of office had expired ; that the appellee had duly become his successor, and that said taxes remain due and unpaid ; Wilcox and Coverdale are made defendants. It is also alleged that said Coverdale signed said bond as one of the sureties ; that the county is the party in interest, and should have been the defendant in said replevin

Coverdale et al. v. Alexander, Treasurer.

suit, and that said bond should have been for its use, and hence it prosecutes this suit.

The bond is as follows:

"We, Elvira Wheeler, Samuel Wheeler, Eli Coverdale and John Q. Bryant, acknowledge ourselves bound to William F. Wilcox and Eli Coverdale, in the sum of three hundred dollars. Witness our hands and seals this 6th day of May, 1878.

"The condition of the above obligation is, that whereas said Elvira Wheeler, wife of Samuel Wheeler, has filed her complaint before George H. Chase, a justice, averring that said William F. Wilcox and Eli Coverdale do unlawfully detain from her personal property of the value of one hundred and fifty dollars, upon which complaint she prays restitution of said property: Now, if the said Elvira Wheeler and Samuel Wheeler, her husband, shall prosecute said complaint to effect and return said property, if return be awarded to said Wm. F. Wilcox and Eli Coverdale, and pay all costs and damages adjudged against him in said action, then said obligation shall be void, else in full force.

ELVIRA WHEELER,

"ELI COVERDALE,

"SAMUEL WHEELER,

"J. Q. BRYANT.

"Attest: G. H. CHASE."

Elvira Wheeler, Samuel Wheeler, Coverdale and Bryant appeared and demurred severally to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

The court overruled the several demurrers, to which the appellants severally excepted.

The cause was submitted to the court for trial. The court found for the appellee, and, over a motion for a new trial, rendered final judgment for him.

The rulings of the court upon the several demurrers are assigned as errors.

It appears by the bond filed as the foundation of the action, that Elvira Wheeler was, at the time she executed the

Robinson *et al.* v. Ferrier *et al.*

bond, the wife of Samuel Wheeler, her co-obligor. As to her, the bond was void. Being a married woman, she had no capacity to enter into such a contract. Her sureties might have been, and doubtless were, bound, but she was not. The coverture of Elvira Wheeler appearing upon the complaint, her demurrer should have been sustained. *Long v. Dixon*, 55 Ind. 352.

It is insisted by the appellant, that the bond sued on is void, because the justice had no jurisdiction in the action of replevin. It appears from the record, that the plaintiff in the replevin suit, in her complaint, verified by her affidavit, stated the value of the property at \$150. We think the justice, upon this complaint, had authority to accept the bond and issue the writ. The issuing of the writ of replevin, upon the filing of the bond, was a sufficient approval of it by the justice.

The judgment below should be reversed, with instructions to the court below to sustain the demurrer of Elvira Wheeler to the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, with instructions to sustain the demurrer of Elvira Wheeler to the complaint, and with leave to the appellee to amend the complaint as to the other appellants.

No. 8768.

ROBINSON ET AL. v. FERRIER ET AL.

SUPREME COURT.—*Weight of Evidence*.—The Supreme Court will not disturb a judgment upon the mere weight of the evidence.

From the Clinton Circuit Court.

J. N. Sims, for appellants.

J. Claybaugh and *B. K. Higinbotham*, for appellees.

BEST, C.—The appellants brought this suit against the appellees to subject a life annuity due from William Chout to David Ferrier, to the payment of a judgment recovered by

Robinson *et al.* v. Ferrier *et al.*

the Farmers Bank of Frankfort, Indiana, against David and James Ferrier, and which had been assigned to the appellants.

David and James Ferrier joined in an answer of two paragraphs. The first was a general denial, and in the other they answered that on the 9th day of September, 1879, they conveyed eighty acres of land to the appellants—forty acres to each of them—in part consideration of which they agreed to pay said judgment, and afterwards they did pay the same to the Farmers Bank of Frankfort, Indiana, but caused it to be assigned to them.

A reply in denial was filed. The issues were tried by the court and a judgment, over a motion for a new trial, was rendered for the appellees.

The appellants appeal and assign as error the order of the court in overruling their motion for a new trial.

The only reason embraced in the motion for a new trial was that the finding was not supported by sufficient evidence.

There was no dispute about the judgment nor its assignment. The only dispute was whether the appellants had agreed to pay the judgment in part payment of the land which the appellees had conveyed to them. Upon this question of fact the testimony was conflicting. At least two witnesses testified that appellants had agreed to pay the judgment, while the appellants denied any such undertaking. Under these circumstances we can not disturb the judgment. The well established rule of this court, supported by a long and unbroken line of decisions, is not to disturb a judgment upon the mere weight of the evidence. *Simpson v. Payne*, 58 Ind. 431.

There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellants' costs.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

Chambers *et al.* v. Butcher *et al.*

No. 9583.

CHAMBERS ET AL. v. BUTCHER ET AL.

VERDICT.—*Special Findings.*—Where there is a general verdict, and also facts specially found upon questions sent to the jury, the latter will not affect the former, unless, when all taken together, they are in irreconcilable conflict with it; it is not enough that one of them, considered separately, shows such conflict.

SAME.—*Interrogatories.*—If two answers of the jury to interrogatories be in conflict with each other, both must be disregarded, in considering whether the general verdict is controlled by the special findings.

SAME.—*Venire de novo.*—*Issue.*—*Pleading.*—*Cross Complaint.*—*Practice.*—Complaint to recover real estate, to which there was no answer, but a cross complaint averring facts which, if true, would defeat a recovery on the complaint; there was also an answer in avoidance of the cross complaint, but no reply. The record recited that "the cause being at issue, comes a jury," etc., and there was a verdict for the defendants, on the cross complaint, which took no notice of the complaint.

Held, that the complaint should, after verdict, be treated as if it had been denied, and that judgment for the plaintiff, for want of an answer or *non obstante veredicto*, should be refused.

Held, also, that the verdict must be regarded as for the defendants as well upon the complaint as upon the cross complaint.

SAME.—Informality of a verdict will not vitiate it, if upon reasonable intendment it can be seen that it covers the issues, but the court will disregard form, and make it serve. It will be avoided only from necessity originating in doubt of its import, or its manifest tendency to injustice, or because the issues found are immaterial.

CONTRACT.—*Statute of Frauds.*—Where lands are to be conveyed to the vendee upon his executing a written agreement to reconvey upon the performance of conditions, and he receives the deed without then executing the writing on his part, but engages to do so when he can get time to prepare it, which he never does, he can be compelled to perform it.

CONTINUANCE.—*Absent Witness.*—*Diligence.*—Where a cause has been long pending and once continued, an affidavit for a continuance for an absent witness, whose residence has all the time been unknown to the party, and which, as to diligence, alleges only that "since the cause has been pending he has been making diligent enquiry as to the whereabouts of the witness," and that he has, only a few days before, learned that the witness resides in Kansas, but not the place of his residence, is insufficient, because of its failure to state specifically the facts showing diligence of enquiry.

BILL OF EXCEPTIONS.—*Motion for New Trial.*—Affidavits in support of a motion for a new trial were contained in the motion, but the bill of ex-

88	508
127	255
82	508
138	419
82	508
138	556
82	508
134	324
82	508
137	521
138	253
82	508
142	404

Chambers *et al.* v. Butcher *et al.*

ceptions did not contain them, and had only this concerning them: "And filed in support of said motion the following affidavits (which have been inserted on page — of this record)."

Held, that the affidavits were not properly in the record.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan, J. B. Mulky and R. A. Fulk,
for appellants.

R. W. Miers, J. H. Loudon, J. R. East and W. H. East,
for appellees.

MORRIS, C.—The appellant John G. Chambers brought this suit against the appellees Hiram Butcher and John E. Butcher, to recover the possession of certain real estate, situate in Monroe county, Indiana. The complaint is in the usual form, alleging that the appellant is the owner in fee of the land in controversy; that the appellees hold, and have one year held, possession of the same without right; demanding judgment for possession and damages.

The appellees appeared to the action and filed a cross complaint in two paragraphs.

In the first paragraph they state that on the 31st day of July, 1871, they were the owners and in possession of said real estate, and that, at that time, Paris C. Dunning and Henry Ritter held by assignment a mortgage and judgment, which were liens on said land, amounting to about \$1,700; that the appellees, being desirous of paying off said liens and not having the means with which to run and operate a mill situate on said premises, entered into an agreement with one John M. Stultz (who is made a defendant to the cross complaint), whereby they agreed to convey said real estate to the said Stultz in trust, to hold for them for the period of two years, and apply the income and profits of the said estate and the mill situate thereon to the repayment of the money advanced by said Stultz in assuming the payment of the said liens on said real estate; the appellees also agreed to bestow all their time in and about the running of said mill so as to insure to said Stultz as large profits therefrom as possible.

Chambers et al. v. Butcher et al.

They also agreed to board the hands necessary to run said mill, said labor and boarding to be done and bestowed without any compensation other than by the payment of the liens on said real estate by the said Stultz; that it was also agreed, that if, from the rents and income of said mill, the said Stultz should not be repaid the money by him advanced, at the end of two years, he should nevertheless reconvey to the appellees said real estate, and the balance should be paid to him by sawing at fifty cents per 100 feet, he furnishing the logs; but, that if the profits of the property should exceed the amount due Stultz, he should pay over the excess to the appellees; it is also stated that Stultz was to execute to the appellees a writing at the time they were to deliver the deed to him for said real estate, containing the terms of said agreement and binding him to reconvey to the appellees as agreed; that said writing containing said contract and the conveyance were to be parts of the same transaction; that on the 31st day of July, 1871, the appellees made and tendered to said Stultz a warranty deed for said real estate, and demanded from him said written agreement; that Stultz, intending to cheat and defraud the appellees, falsely pretended that he was too much pressed with business to prepare said writing at the time, but promised that if they would deliver to him said deed, he would, in a few days, prepare, sign and deliver to them a writing containing the said contract; that, relying upon his promise and confiding in his honesty and integrity, they delivered said deed to said Stultz; that they had often, and from time to time, demanded said writing from said Stultz, but that he had, upon various pretexts, put them off and failed to execute to them the writing as agreed; that said Stultz paid off said liens, and that the appellees had done and performed all things on their part, by the terms of said contract, to be done and performed; that, with intent to cheat the appellees, the said Stultz fraudulently caused an execution to be issued on the judgment which he had assumed and paid, and caused said real estate to be levied upon and sold upon said execu-

tion to himself; that the appellees objected to and protested against said sale, but that the said Stultz assured them that it was to their interest that such sale should be made; that said Stultz continued to receive the rents and profits of said mill and real estate until they greatly exceeded the amount by him paid out in removing said liens, and that finally he absconded, in debt and insolvent, without having reconveyed said real estate to the appellees as agreed; that he was afterward, upon the application of his creditors duly declared a bankrupt, and one John Sherlock duly appointed his assignee in bankruptcy; that said assignee took possession of said real estate, and as such procured a deed for said land from the sheriff of Monroe county, pursuant to the sale made to Stultz; that the appellant has no other title to said real estate than such as he derived through a sale and conveyance of the same to him by said Sherlock as such assignee; that, at the time the appellant purchased, he had full notice of the rights of the appellees. They further state that, by reason of the absence of said Stultz, they have been unable to demand a reconveyance of said estate.

The second paragraph of the cross complaint is like the first, except that it is averred that the deed executed by the appellees to Stultz was given as security for the sum by him advanced to pay off said liens, and that it was, and was intended to be, a mortgage; that most of the sum advanced by Stultz, \$1,000, had been paid off at the time he caused the real estate to be sold on said judgment; that the appellees had no knowledge of said sale, etc. In other respects, the second is the same as the first paragraph of the cross complaint. The relief asked is, that the appellees may be declared the owners of said real estate; that their title may be quieted, and for general relief.

The appellant Chambers answered the cross complaint in four paragraphs, the first being the general denial.

The second states, that the appellant derives his title from one Sherlock, who, as the assignee of said Stultz in bankruptcy,

Chambers et al. v. Butcher et al.

sold and conveyed said real estate to him for a valuable consideration, without any knowledge on his part of the appellees' claim to said real estate.

The third states that the appellant Chambers is the owner of the real estate mentioned in the complaint. The facts in relation to the purchase of the real estate by Stultz on a judgment and decree of foreclosure, which were the first lien on said real estate, and amounting to more than its value, are stated. The absconding and bankruptcy of Stultz are also alleged. It is averred that said real estate was sold by Stultz's assignee in bankruptcy; that the assignee sold said real estate at public sale, giving due notice of the sale; that the appellees attended the sale, and made no objection to it, nor did they set up any claim to the property.

The fourth paragraph of the answer alleges that the appellant is the owner of said real estate, and had been such owner for five years. It states the manner in which he derived his title, and denies that he had, at the time he obtained his title, any notice or knowledge of any claim by the appellees.

There seems to have been no reply to the answer to the cross complaint, nor was there any answer to the complaint.

The record states that the cause, being at issue, was submitted to a jury for trial. The jury returned a general verdict on the cross complaint for the appellees, and their answers to the following interrogatories, propounded by the appellant:

"1. Did the defendant John E. Butcher, on the 1st day of July, 1871, own in fee simple, and did he have the paper title to, the lands mentioned and described in the complaint?

Answer. Yes.

"2. Did the said John E. Butcher afterwards, on or about the 15th day of July, 1871, by deed convey the land described in the complaint and cross complaint to John M. Stultz?

Answer. Yes.

"3. Did the defendants Hiram Butcher and John E. Butcher enter into a contract with said John M. Stultz to convey the lands described in the complaint and cross complaint, and to

Chambers et al. v. Butcher et al.

work for the said John M. Stultz, in the mill situate on said land, and to board other hands who should work in said mill for said Stultz, and give said Stultz the rents and profits and proceeds of said mill for the term of two years from the execution of said deed to said lands, in consideration that said Stultz, at the end of said two years, should reconvey said lands, two-thirds to the said Hiram, and one-third to the said John E. Butcher, and was it further agreed that said Stultz should pay off and satisfy liens on said land to the amount of \$1,700? Answer. Yes.

"4. Was it further agreed in said contract, that each party should keep an accurate account of the work, board, rent and profits of said mill, and work to carry the same on during said two years, and if the work done and performed by the said Butchers should amount to more than \$1,700, was the same to be paid to them by the said Stultz, and if said work, rent, board, and profits should amount to less than \$1,700, were the said Butchers to pay the difference to said Stultz, by sawing lumber at fifty cents per hundred? Answer. Yes.

"5. Was the contract, if any you find, made as specified in questions three and four? was such contract made in writing or was it verbal? Answer. Verbal.

"6. In the contract made, if you find any was made, did the defendant Hiram Butcher, act for himself and also for the said John E. Butcher, and with the knowledge and consent of John E., in making said contract? Answer. Yes.

"7. Have the defendants performed their part of said contract as specified in questions three and four? Answer. Yes.

"8. Did John M. Stultz perform his part of said contract? Answer. No.

"8½. Did the plaintiff John G. Chambers, at the time he purchased the land mentioned in the complaint, have notice that the defendants were claiming the land as their own, and that they intended to hold it? Answer. Yes.

"9. Was the plaintiff present at the sale of the land in
VOL. 82.—33

Chambers *et al.* v. Butcher *et al.*

controversy at Fairfax, when the same was sold by John Sherlock, as assignee in bankruptcy of said John M. Stultz? Answer. Yes.

"10. Did the defendants, at said assignee's sale, give any notice that they intended to hold said lands as their own, and did they on that account forbid the sale of said land? Answer. Yes.

"11. Was such notice so given sufficient to put a careful and prudent man upon inquiry as to the claim of these defendants to said land, when taken in connection with all the circumstances developed by the evidence in this case? Answer. Yes."

The jury also answered the following interrogatories propounded by the appellees:

"1. What amount of liens did Stultz agree to pay and actually pay in consideration of the defendants' deed to him for this property by John E. Butcher? Answer. \$1,700.

"2. Has the said Stultz been fully paid or reimbursed the amount so paid, by the plaintiffs or either of them? Answer. Yes.

"3. Did said Stultz agree at the time the deed was made to him, that he would hold the property and enjoy it for two years and would then reconvey it to the plaintiffs without any consideration? Answer. Yes.

"4. If you find that Stultz made any agreement to reconvey, was such agreement absolute upon the expiration of two years and depending upon no other condition? Answer. Yes.

"5. Did Chambers, at the time he purchased the real estate, have knowledge or notice of the terms of the agreement between Butcher and Stultz? Answer. Yes."

The appellant moved the court for judgment upon the special findings of the jury; this motion was overruled. He then moved for a *venire de novo*. This motion was also overruled. He moved for judgment notwithstanding the verdict, which was overruled. The appellant then moved for judgment for want of an answer to his complaint. This mo-

tion was overruled. The appellant then moved for a new trial, and this motion was also overruled and judgment rendered for the appellees.

The errors assigned call in question the rulings of the court upon the several motions made by the appellant.

We will consider these motions in the order in which they were made.

We think the court did not err in overruling the appellant's motion for judgment upon the verdict. The general verdict was a finding of the facts in favor of the appellees as alleged in their cross complaint. Assuming, as the appellant insists, that the finding was upon the first paragraph of the cross complaint, the general verdict must be held as establishing all the material facts alleged in it, and to entitle the appellees to judgment, unless the facts specially found are irreconcilably in conflict with the general verdict.

The appellant insists that the answer of the jury to the third interrogatory propounded by the appellees is inconsistent with the general verdict. The answer is, that Stultz agreed to reconvey the real estate in controversy without any consideration. Taking all the interrogatories and answers together, it is obvious that the jury intended to say by this answer, that he was to reconvey, without any consideration other than that specified in the agreement pursuant to which the appellees conveyed to him. The jury had, in answer to the third and fourth interrogatories propounded by the appellant, answered that in consideration of the use of the property, the labor of the appellees, and the boarding furnished by them, Stultz agreed to reconvey. These seemingly conflicting and contradictory answers may, and if possible should, be reconciled. If they can not be reconciled, they must neutralize each other, and can not control the general verdict. *Byram v. Galbraith*, 75 Ind. 134, 140.

The appellant says that the agreement of Stultz to reconvey can not be enforced, because it is stated in the cross complaint to have been verbal. But it is also alleged that Stultz,

Chambers *et al.* v. Butcher *et al.*

at the time the contract was made, and at the time the deed was delivered, agreed and promised to reduce the contract to writing, but that he failed to do so. This, the general verdict found for the appellees; the special findings are silent upon the point. This contract could be enforced. *Butcher v. Stultz*, 60 Ind. 170; *Teague v. Fowler*, 56 Ind. 569.

The appellant also insists that the court erred in overruling his motion for a *venire de novo*, because the verdict does not find upon the complaint, but only upon the cross complaint. The record contains no answer to the complaint, nor reply to the special paragraphs of the answer to the cross complaint. The record states, that "the cause being at issue, comes a jury," etc. As both parties went to trial without an answer to the complaint, and without objection, the complaint will be regarded as controverted without answer. *Taylor v. Short*, 40 Ind. 506; *Train v. Gridley*, 36 Ind. 241. The cross complaint, upon which the verdict finds, not only sets up the claim of the appellees to the land in controversy, but it states the title of the appellant to it, the manner in which it was derived, and from whom, and avers that the appellant had no other title. It may, and it should, we think, be regarded as an admission that the appellant was entitled to recover, unless he derived his title in the manner set forth in the cross complaint. It is the title of the appellant set forth in the cross complaint, which the appellees seek to avoid by proof of the facts alleged in the cross complaint. The proof of the facts alleged in the cross complaint would, necessarily, disprove the facts alleged in the appellant's complaint. It follows, therefore, that the finding of the jury upon the cross complaint, in favor of the appellees, was, by the clearest implication, a finding against the appellant upon the complaint. Substantially, therefore, the verdict covered the issues. Where the court can perceive that the substance of the issue is contained in the verdict, it will give validity to the verdict, however informal it may be, and, "In the language of Ch. J. HOBART,

‘the court will work the verdict into form, and make it serve.’ For verdicts are to have a reasonable intendment, and to receive a reasonable construction, and are not to be avoided unless from necessity, originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice.” 1 Graham & Wat. New Trials, 160. In this case there is no room for reasonable doubt as to the import of the verdict; the issue was material, and there is no apparent tendency to injustice. We think there was no error in overruling the motion for a *venire de novo*.

There was no error in overruling the appellant’s motion for judgment, notwithstanding the verdict. The issues were tried and found for the appellees.

Nor, if, as we have held, the complaint was to be deemed controverted, though not answered, did the court err in overruling the appellant’s motion for judgment on the complaint for want of an answer.

It is also claimed that the court erred in overruling the motion for a new trial. When the case was called for trial, the appellant moved for a continuance upon his own affidavit that one John M. Stultz was an important and material witness for him, without whose testimony he could not safely proceed to the trial of the cause. The facts which appellant expected to prove by Stultz are stated; they are material to the issues. The appellant states that he believes the facts to be true. It is stated that the absent witness resides in the State of Kansas, but that the affiant does not know in what locality; that the witness left Indiana in 1872; that affiant has, since this cause has been pending, been making diligent inquiry to learn the whereabouts of said witness; that since his absence from the State in 1872, his residence has been all the time unknown to affiant; that he first learned of his whereabouts on the previous Saturday evening; that he can secure the testimony of the witness by the next term of court, etc. The only question upon the application for a continuance

Chambers *et al.* v. Butcher *et al.*

is, does it show proper diligence on the part of the appellant? The affidavit does not state what enquiries were made, but that they related to the whereabouts of the witness; it does not show when the enquiries were made nor of whom, whether of persons likely to know his whereabouts or not. We think the affidavit fails to show proper diligence to procure the testimony of Stultz. The cause had been pending for a considerable time; had been continued over one term. The facts constituting due diligence should have been specifically stated. *McKinlay v. Shank*, 24 Ind. 258; *Wolcott v. Mack*, 53 Ind. 269; *Ohio, etc., R. W. Co. v. Dickerson*, 59 Ind. 317.

The appellant filed with his motion for a new trial affidavits showing that one of the jurors was related by marriage to one of the appellees, the juror's wife's mother being the cousin of Hiram Butcher. The affidavits are in the record as a part of the motion for a new trial, but are not in the bill of exceptions, and are not alluded to therein otherwise than as follows: "And filed in support of said motion the following affidavits (which have been inserted on page — of this record)." The affidavits, thus referred to, could only be made a part of the record by bill of exceptions; if not in the bill of exceptions, they can not be considered as a part of the record. The question as to the incompetency of the juror is not, therefore, properly before us.

The other causes stated for a new trial are not discussed in the appellant's brief, and must be considered as waived.

We have considered all the questions discussed in the appellant's brief, and conclude that there is no error in the record.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be in all things affirmed, at the costs of the appellant.

 COX v. RASH *et al.*

No. 9344.

COX v. RASH ET AL.

82	519
144	438

EVIDENCE.—*Action to Recover Real Estate.*—*Claimant's Title.*—One who seeks to recover real estate must recover on the strength of his own title, and not on the weakness of his adversary's.

SAME.—*Descents.*—*Illegitimate Child of Decedent.*—An illegitimate child, claiming title to real estate of its father, must prove that he died intestate, without heirs resident in the United States.

SAME.—*Marriage.*—*Cohabitation and Reputation.*—Where a husband dies intestate without issue, leaving neither father nor mother, but an illegitimate child, his widow takes his entire estate, which upon her death descends to her heirs; and, in an action by such child to recover real estate so descending, it is not necessary that such heirs prove the marriage of the decedents by the record, nor by a witness of the ceremony, but may prove it by evidence of cohabitation and reputation.

SAME.—*Objections.*—*Bill of Exceptions.*—A party objecting to offered evidence must state the grounds of his objection at the time, and embody them in his bill of exceptions.

From the Hancock Circuit Court.

J. A. New and C. E. Barrett, for appellant.

W. S. Denton, for appellees.

ELLIOTT, J.—Appellant claims title to real estate, of which Thomas J. Hicks died seized, upon the ground that she is the illegitimate child of the deceased.

It is incumbent upon one who seeks to establish title to real estate to show such facts as constitute title; the recovery must be upon the strength of the claimant's own title, not upon the weakness of his adversary's. It was necessary, therefore, for the appellant to prove title in herself, for no matter how weak that of her adversary, unless her own was good, no recovery could be had.

At common law, an illegitimate child could not inherit. Our statute has changed the rule, and provides that such a child may in some cases take by descent. It is only in such cases as the statute makes provision for, that an illegitimate child can inherit from the father. The statute enables such a child

Cox v. Rash et al.

to inherit in cases where the father dies intestate without heirs resident in the United States. 1 R. S. 1876, p. 410.

It was essential, therefore, for the appellant to show, as part of her case, that Thomas J. Hicks died intestate, leaving no heirs resident in this country. We have carefully examined the evidence and are of the opinion that it does not establish this material fact.

We think the evidence shows title in the appellee Ginsey Rash. It appears that Thomas J. Hicks and Elizabeth Hicks had lived together as husband and wife for almost thirty years, that they constantly declared that they were married, and those who knew them always recognized them as husband and wife. They had no children, and Thomas died leaving his wife surviving him, but leaving neither father nor mother. Elizabeth survived Thomas about a year and died leaving, so far as the evidence shows, no other heir than her sister Ginsey Rash.

It is clear that if Elizabeth was the wife of Thomas, she inherited at his death the real estate in controversy. Where a husband dies intestate without issue, and leaving neither father nor mother surviving him, the widow takes the entire estate. This is expressly declared by the 26th section of the statute of descents. *Sullivan v. McGowen*, 33 Ind. 139.

It is contended that there was no marriage proved, for the reason that no record was introduced and no witness present at the ceremony was adduced. Marriage in such a case as this need not be proved by the record. Nor does it require the testimony of a witness who was present at the time the marriage took place. In *Bowers v. Van Winkle*, 41 Ind. 432, it was said: "It is a general rule that in civil suits, except for criminal conversation, cohabitation and reputation are sufficient evidence of marriage. *Fleming v. Fleming*, 8 Blackf. 234; *Trimble v. Trimble*, 2 Ind. 76."

We do not feel called upon to decide whether a marriage, valid where made, is void under the statute of this State, because one of the parties has more than one-eighth negro blood. There was evidence fairly justifying the inference that Thomas

Sansberry *et al.* v. Lord *et al.*

J. Hicks was a white man, without any admixture of African blood. We can not disturb the finding of the court upon the question of fact whether Hicks was or was not of negro blood.

The argument upon the rulings admitting evidence is unavailing for the reason that the record does not show that any objections were stated to the trial court. It is settled that the party must not only state his objections at the time the evidence is offered, but he must also embody them in his bill of exceptions. *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98).

Judgment affirmed.

Petition for a rehearing overruled.

No. 9646.

89 521
120 510

SANSBERRY ET AL. v. LORD ET AL.

SHERIFF'S SALE.—*Sale of Real Estate of Debtor After Conveyance.*—A sheriff's sale of real estate, after the same has been conveyed by the debtor to his vendee, is not invalid simply because the debtor had other real and personal property of sufficient value to satisfy the execution.

SAME.—*Right of Vendee to Have Other Property of Execution Defendant Exhausted.*—In such case the vendee, if he requests it, is entitled to an order requiring the officer to first exhaust the property of the debtor, but the sale of the property is not invalid in the absence of such order.

From the Madison Circuit Court.

J. W. Sansberry and *M. A. Chipman*, for appellants.

M. S. Robinson and *J. W. Lovett*, for appellees.

BEST, C.—This action was brought by the appellees against the appellants, to set aside a sheriff's sale of a quarter section of land in Madison county, Indiana.

A demurrer for the want of facts was overruled to the complaint and this ruling presents the only question in the record.

The facts averred are briefly these: That James W. Sansberry, one of the appellants, recovered a judgment in the

Sansberry *et al.* v. Lord *et al.*

Madison Circuit Court, on the 10th day of March, 1875, against James McGraw, William C. Flemming, William R. Myers and William Roach; that McGraw was the principal and the other parties were sureties in said judgment, as shown by the record; that William C. Flemming owned the land sold by the sheriff after the rendition of the judgment, and that he conveyed it by warranty deed to one Ann C. Allen, who devised it to the appellees; that thereafter James W. Sansberry caused an execution to issue upon his judgment which was delivered to Thomas J. McMahan, one of the appellants, who was the sheriff of said county and who, by virtue thereof, sold the land to Sansberry for four hundred dollars and issued to him a certificate of purchase, without having demanded property of James McGraw, and without having exhausted the residue of the property of William C. Flemming, though he was the owner of a large amount of real and personal property, subject to execution and of sufficient value to satisfy the judgment.

It is not averred that James McGraw had any property, and, if he had none, the failure of the sheriff to make a demand upon him for property will not invalidate the sale. The appellees do not claim that it will, but insist that the failure to exhaust the residue of the property of William C. Flemming renders it invalid, and in support of this proposition cite the cases of *Day v. Patterson*, 18 Ind. 114, *Sidener v. White*, 46 Ind. 588, and *Houston v. Houston*, 67 Ind. 276. These cases do not decide the question here involved. They merely decide, that where a judgment is a lien upon two or more parcels of real estate, and one of them is thereafter sold, the judgment creditor will be restrained from selling such parcel until the residue of the land is sold, but do not decide that if such parcel is sold the sale is invalid. It is presumed to be the duty of the judgment debtor, as between himself and his vendee, to pay the judgment, and if he retains any of the property encumbered by it, a court of equity will, without impairing the

Sansberry *et al.* v. Lord *et al.*

lien, require the judgment creditor to first exhaust the property held by the debtor so as to protect his vendee. This, however, will not be done unless it is desired, and if a vendee stands by and suffers his property to be sold without asking such relief, we know of no case that holds such sale illegal simply because he was entitled to such order. Such rule of law would require judgment creditors to adjust the equities of persons interested in the land encumbered by the judgment without any notice of their existence, and would defeat the title of a purchaser at sheriff's sale though he had no notice of an outstanding title or a secret equity. The judgment being a lien upon the entire land, the creditor was authorized to sell any portion of it, in the first instance, in the absence of an order directing it to be otherwise offered. Again, it is not averred that the deed to Ann C. Allen had been recorded, or that Sansberry had any notice that Flemming had sold the land, and as he purchased for value and without notice, for aught that is averred, he must be regarded as a *bona fide* purchaser, and the deed of conveyance made by Flemming to Anna C. Allen must, as against Sansberry, be regarded as fraudulent and void. 1 R. S. 1876, p. 365, section 16; *Milner v. Hyland*, 77 Ind. 458.

The deed being regarded as fraudulent and void, it follows that the appellees who claim through it can not question the legality of the sale.

It is said, however, that, as Sansberry was the execution creditor, he is charged with notice of all irregularities in the sale. This is true, but he is not charged with notice of an unrecorded deed.

The complaint was insufficient and the demurrer should have been sustained.

PER CURIAM.—It is therefore ordered, that the judgment be and it is hereby in all things reversed, at the appellees' costs, with instructions to sustain the demurrer to the complaint.

Ellis v. Keller.

No. 8183.

ELLIS v. KELLER.

JUDGMENT.—Entry.—Misprision.—Practice.—Motion to Correct. Bill of Exceptions.—A motion to correct a misprision in the entry of a judgment is not, like a complaint, a part of the record on appeal, without a bill of exceptions or order of the court, and the ruling of the court on such motion presents no question, unless excepted to and the grounds of objection shown. Such proceeding is not governed by section 396, R. S. 1881.

SAME.—Action Brought in Term Time.—Mistake in Name of Party in Endorsement on Complaint.—Jurisdiction.—When an action is commenced for a day in term time later than the first, a mistake in the name of the plaintiff in the endorsement upon the complaint of the return day, as *Kelley* for *Keller*, the true name being in the body of the complaint and in the summons, which is returned duly served, and judgment thereon taken by default, does not affect the jurisdiction of the court.

From the Jasper Circuit Court.

D. Moran, for appellant.

M. F. Chilcote, for appellee.

WOODS, J.—Proceedings to correct a judgment. The judgment was rendered against the appellant by default, at the June term, 1878, of the circuit court, and the correction made, upon motion at the ensuing November term. The appellant was served with notice, and appeared at the hearing of the motion, and now claims to have made a number of objections to the proceedings; but the record shows only a general exception to the order for the correction, no ground of objection being stated. The bill of exceptions is also defective in that it does not contain a copy of the motion on which the court acted. A reference is made by the clerk to a copy which precedes the bill of exceptions; but, as is well settled, such reference can be made only to documents, which, in the place referred to, are proper parts of the record. The motion in question was to obtain the correction of a clerical misprision, whereby, in the entry of the judgment, the plaintiff's name was written *Kelley* instead of *Keller*. Such correction, it has been determined, may be made upon mere

 Boyd *et al.* v. Jackson *et al.*

motion, which is not, like a complaint, subject to a demurrer (*Conway v. Day*, 79 Ind. 318, and cases cited), and which, therefore, can be made a part of the record only by bill of exceptions or by an order of court. There was, however, no error in the action of the court. The complaint and summons, upon which the default and judgment were entered, were faultless, except that in the endorsement on the back of the complaint, designating the day of the term to which the summons should be made returnable, the name of the plaintiff was written *Kelley*. The name on the face of the complaint and in the summons being right, and the summons having been duly served, the jurisdiction was complete, the judgment was not invalid, and there was in the record ample evidence upon which the correction could be ordered, if, indeed, a formal correction in such a case be necessary.

The proceedings for the correction of such mistakes are not governed by the 99th section of the code. See *Miller v. Royce*, 60 Ind. 189, and cases cited.

Judgment affirmed, with costs.

 No. 8443.

BOYD ET AL. v. JACKSON ET AL.

VENDOR AND PURCHASER.—*Vendor's Lien.*—*Mortgage.*—*Complaint.*—*Waiver.*—*Contract.*—*Promissory Note.*—*Decedents' Estates.*—*Evidence.*—The plaintiff held a note for purchase-money of real estate, on E. B., so that a vendor's lien might have been enforced. E. B. died solvent, leaving L. B. and others his heirs at law. The entire tract of land afterwards, by purchase from the other heirs of E. B., passed to L. B., who had notice of the plaintiff's lien. Afterwards L. B., in consideration of an assignment of the note (for which he received payment from E. B.'s administrator), executed to the plaintiff his own note for the amount thereof, specifying therein that it was "for purchase-money of land sold by the plaintiff." L. B. then conveyed a portion of the land to C., who had notice of the facts.

89	525
144	438
89	524
148	681
150	657
82	525
154	598
82	525
107	621

Boyd *et al.* v. Jackson *et al.*

Held, that the complaint was not objectionable for praying a lien upon lands other than those subject thereto.

Held, also, that the lien was not waived by failure to enforce the debt against E. B.'s estate.

Held, also, that the note given by L. B. was a recognition of the plaintiff's lien, and an express undertaking by him to discharge it, and the plaintiff thereby released his claim on E. B.'s estate.

Held, also, that C. held the land subject to the satisfaction of the lien after L. B.'s property should be exhausted.

Held, also, that evidence was admissible, showing that the note of E. B. specified that it was given for purchase-money of land, and that E. B. declared, when he executed it, that that made it as good as a mortgage, and that the plaintiff required L. B. to make his note in the same form, so that it would be a lien on the land, was admissible as part of the *res gesta*, and to show the intention to preserve a lien.

Held, also, that the note of L. B. was not an independent security, but must, under the circumstances, be regarded as a mere substitute for the note of E. B.

Costs.—Parties.—Where one of several defendants tenders separate issues, all of which are found against him, there is no error in adjudging the costs thereof against him personally.

From the Switzerland Circuit Court.

T. Livings, for appellants.

J. D. Works and *J. A. Works*, for appellees.

NIBLACK, J.—This was a suit by Abigail C. Jackson and her husband, Reuben Jackson, against Lewis G. Boyd and Louisiana Boyd, his wife, Philander S. Sage, Henry J. Cole and William A. Cross, upon a promissory note executed by the said Lewis G. Boyd, and to enforce a vendor's lien upon a tract of land in which all the defendants claimed some interest.

Cross demurred separately to the complaint, but his demurrer was overruled. He then answered in two paragraphs, and a demurrer was sustained to the second paragraph.

There was a verdict for the plaintiffs, and, over a motion for a new trial by Cross alone, a judgment was rendered upon the verdict, which, amongst other things, declared a vendor's lien in favor of the said Abigail, on nine-tenths of the land, and ordered the enforcement of such lien on that proportion of

Boyd et al. v. Jackson et al.

the land, after the property of Lewis G. Boyd, subject to execution, should be exhausted. The court also taxed some of the costs personally and separately against Cross.

The facts relied on for a recovery in this case were substantially as follows :

Some time previous to the year 1873, Abigail C. Jackson and several other persons, being the owners, as tenants in common, and as the heirs at law of one Amos Simmons, deceased, of a sixty-acre tract of land in Switzerland county, sold and conveyed such land to one Elijah Boyd, for the gross sum of two thousand one hundred dollars ; that the interest of the said Abigail in the land was rated at the sum of three hundred and fifty dollars ; that the said Elijah Boyd paid her in hand the sum of fifty dollars, and gave her his unsecured promissory note for the remaining three hundred dollars ; that not long afterwards, and without having paid this note, the said Elijah Boyd died intestate, leaving the appellant Lewis G. Boyd, and nine others, as his children and heirs at law, and an estate more than sufficient to pay all his debts ; that afterwards, in certain partition proceedings between some of the heirs at law of the said Elijah Boyd, and the assignees of the others, the entire tract of land, purchased by him as above stated, was sold by a commissioner appointed for that purpose, and purchased by the said Lewis G. Boyd, he having previously bought the undivided interests of some of the other heirs ; that at the time the said Lewis purchased said land, and the several interests therein, he had full knowledge of the fact that the note executed by his father to Mrs. Jackson, as above set forth, remained unpaid ; that after he became the owner of the land, the said Lewis purchased that note of Mrs. Jackson, or, as some of the witnesses termed it, borrowed the use of it, giving her his own note for and in place of it, so that he might use it in settlement with his father's estate, to which he was indebted ; that afterwards, in a settlement between the said Lewis and the administrator of that estate, he, the said Lewis, was credited with the amount of that note,

Boyd *et al.* v. Jackson *et al.*

and executed to the administrator a receipt for the sum of money due upon it; that afterwards the said Lewis executed to Mrs. Jackson the note sued on in this action, which was in renewal of, and for the gross amount due upon, the first note given by him to her, and was as follows:

"\$382.65.

MARKLAND, Nov. 1st, 1873.

"On or before the first day of November, 1876, I promise to pay Abigail C. Jackson, three hundred and eighty-two dollars and sixty-five cents, the balance due her as purchase-money on land sold by her, with ten per cent. interest from date, payable annually, without relief from valuation or appraisement laws of the State of Indiana.

"LEWIS G. BOYD."

That this note was precisely similar to the note first given except as to date and amount; that on the 21st day of November, 1876, the said Lewis G. Boyd and wife, in consideration of the sum of \$525, conveyed to the appellant Cross ten and a half acres of the land in controversy; that before the payment of the purchase-money by him, Cross had notice of all the material facts set forth as above; that Sage and Cole severally claimed some interest in the land as mortgagees under Lewis G. Boyd; that the title to one-tenth of the land had passed through the hands of an innocent purchaser before reaching Lewis G. Boyd.

While the names of all the defendants are used as appellants here, all the objections urged to the proceedings below are made by and on behalf of Cross.

It is insisted that the claim of a vendor's lien, asserted in this case, was radically defective, because made against the whole tract of land instead of the share in it owned and conveyed by Mrs. Jackson. But that was not an objection to the entire claim, but only a question as to the extent of the lien to be determined by the judgment of the court at the final hearing of the cause. It is also insisted that the lien was waived by the failure of Mrs. Jackson to enforce her claim against the estate of Elijah Boyd, inasmuch as his personal estate was primarily liable for its payment.

Boyd *et al.* v. Jackson *et al.*

Under the circumstances Mrs. Jackson had the option of filing her claim against the estate, and of relying upon the estate for payment, or of proceeding directly against the land in the hands of the heirs. If she had been required to first proceed against the estate, her agreement with Lewis G. Boyd would have relieved her of that obligation. That agreement constituted a practical recognition of her lien by the said Lewis, and an express undertaking on his part to pay and discharge it.

After that agreement was consummated Mrs. Jackson no longer had any claim against the estate of Elijah Boyd for the purchase-money due on the land.

Cross having received notice of Mrs. Jackson's lien before he paid the purchase-money on the land conveyed to him, his land properly stands chargeable with the payment of that lien after the property of Lewis G. Boyd has been exhausted.

One witness testified at the trial, over the objection of Cross, that the note executed by Elijah Boyd to Mrs. Jackson specified that it was for the purchase-money on land, and that Elijah Boyd said, when he signed it, that he was glad the note was so written, as that made it as good as a mortgage. Another witness, also, testified, over the like objection of Cross, that when Lewis G. Boyd was negotiating with Mrs. Jackson for a transfer of his father's note to him, she told him that his note to her must be written in the same way that his father's note was, so as to make it a lien on the land.

It is contended that this evidence was in both instances *ex parte*, irrelevant and not binding upon Cross, as he was not present upon either occasion referred to by the witnesses, and hence improperly admitted.

We see no objection to the admissibility of this evidence as a part of the *res gestæ* and as declaratory of the intention of the parties as regards the retention and preservation of a vendor's lien upon the land.

While a vendor's lien results, by implication of law, from
VOL. 82.—34

Boyd et al. v. Jackson et al.

certain transactions between parties, and not from any agreement between them, and is presumed to exist in all cases in which such a lien is allowed by law, yet whether the lien which the law has conferred has been in fact continued in existence, is a matter of intention, as manifested by all the circumstances attending each particular case.

The declarations of Elijah Boyd and Mrs. Jackson, objected to as above, were consequently relevant to the question of the intention of the parties respectively, and hence not erroneously admitted by the court.

It is further contended that the note of Lewis G. Boyd afforded additional and independent security for the payment of the balance due upon the purchase-money, and that Mrs. Jackson waived her vendor's lien upon the land by accepting that note.

The execution and acceptance of that note were, under the circumstances, but the substitution of one note for another, and not, in contemplation of law, the taking of additional and independent security, from which a waiver of the vendor's lien ought to be inferred.

It is further contended that it was error to tax any of the costs against Cross personally; but, as the issues upon which the cause was tried were mainly formed by Cross, and as all the issues tendered by him were found against him, we do not see that he has any reason to complain of the judgment in respect to the taxation of costs.

What we have said practically disposes of all material questions arising in this cause, including those presented by the demurrers to the complaint and the second paragraph of the answer of Cross. *Lagow v. Badollet*, 1 Blackf. 416 (12 Am. Dec. 258); *Aldridge v. Dunn*, 7 Blackf. 249; *Fisher v. Johnson*, 5 Ind. 492; *Waler v. Cox*, 25 Ind. 271; *Humphrey v. Thorn*, 63 Ind. 296; *Dart Vendors and Purchasers, Waterman's Notes*, ch. 14, p. 344; *Jones Mortgages*, sections 189 to 199, both inclusive.

The judgment is affirmed, with costs.

Daunhauer *et al.* v. Hilton *et al.*

No. 9712.

DAUNHAUER ET AL. v. HILTON ET AL.

ASSIGNMENT OF ERRORS.—*Supreme Court.*—An assignment of error must specify why the court ought not to have rendered the judgment complained of. To say “it ought not to have done it,” presents no question. SAME.—*New Trial.*—*Deposition.*—Causes for a new trial are not proper specifications of error, and, therefore, the overruling of a motion to suppress a deposition can not be brought to the consideration of the Supreme Court by an assignment thereof as error.

From the Perry Circuit Court.

C. H. Mason, for appellants.

S. K. Connor and G. T. Porter, for appellees.

BLACK, C.—The appellants, defendants in the court below, have assigned errors as follows:

“1. That the circuit court rendered a judgment in favor of the plaintiffs when it ought not to have done it.

“2. That the circuit court refused to suppress the depositions of plaintiffs, when it ought to have done it.

“3. There was no notice given to take said depositions, and they contain irrelevant matter and leading questions.

“4. Judgment is rendered against all the defendants, when it is certain that defendant Washer was only agent for the other defendants.

“For which, and for other errors, the appellants pray that said judgment be reversed.”

The first assignment is not sufficiently specific to present any question. *Ruffing v. Tilton*, 12 Ind. 259; *Gallettley v. Barrackman*, 12 Ind. 379; *Truitt v. Truitt*, 38 Ind. 16; *Hamrick v. Danville, etc., Co.*, 41 Ind. 170.

The action of the court, to which it is sought to direct attention by the second assignment, should have been made a cause in a motion for a new trial, and the matters stated in the third assignment should have been presented to the court below as grounds for the suppression of the depositions or for striking out parts thereof.

The State v. Frain.

The overruling of a motion to suppress a deposition, or a reason for the suppression of a deposition or portions thereof, can not be brought to the consideration of this court by an assignment thereof as error. *Jeffersonville, etc., R. R. Co. v. Riley*, 39 Ind. 568; *Mercer v. Patterson*, 41 Ind. 440; *Patterson v. Lord*, 47 Ind. 203.

As to the fourth assignment, if the defendant Washer was an agent of the other defendants, and if that fact constituted a reason why judgment should not have been recovered against any defendant against whom judgment was rendered, such an objection to the judgment could not be first raised by an assignment of error. By a careful examination of the record, it would have been discovered by counsel that no judgment was rendered against defendant Washer.

The suggestion that there were "other errors," not specified, is wholly useless. The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

No. 10,322.

THE STATE v. FRAIN.

CRIMINAL LAW.—*Amendment of Affidavit and Information.—Practice.*—

Whether the refusal to permit an amendment of an affidavit and information was erroneous, cannot be considered unless the record shows what amendment was proposed.

SAME.—*Pleading.*—The affidavit and information for a misdemeanor need not show why the prosecution was not commenced by indictment.

From the Martin Circuit Court.

D. P. Baldwin, Attorney General, H. C. Duncan, Prosecuting Attorney, and L. Stephens, for the State.

C. S. Dobbins, for appellee.

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The State v. Frain.

WOODS, J.—Prosecution, upon affidavit and information, for a misdemeanor,—carrying a dangerous weapon. Motion to quash both affidavit and information sustained. The record shows that, upon an intimation by the court that the motion to quash would be sustained for reasons stated, but not shown in the record, the prosecuting attorney moved for leave to amend, which motion, in respect to the affidavit, was overruled; and this ruling, as well as the decision upon the motion to quash, is assigned for error.

The bill of exceptions does not show what amendment it was proposed to make; it is therefore impossible to say that the court erred in refusing to give leave to amend.

The question discussed, under the decision upon the motion to quash, is whether or not, when the crime charged is a misdemeanor only, it must be stated in the affidavit and information, according to the *first* and *second* clauses of section 106 of the act concerning criminal practice, R. S. 1881, sec. 1679, that the accused is in custody or on bail upon the charge, and that the grand jury is not in session, or has been discharged; or that the indictment has been quashed and the grand jury for the term discharged; or, under the *fifth* clause of that section, is it enough to charge the particular misdemeanor, without reference to the matters specified in the other clauses?

The latter view we deem to be the right one. Indeed, it is explicitly declared in section 159 of the act referred to, R. S. 1881, sec. 1733, that "The information may be substantially in the same form as that given for an indictment. * * It shall not be necessary, in an information, to state the reason why the proceeding is by information instead of indictment. And in a prosecution for a felony by information, it shall not be necessary to prove the facts showing the right so to prosecute by information, unless such facts are put in issue by a verified plea in abatement."

We therefore hold that for a misdemeanor neither the affidavit nor the information need state any reason why the prosecution should be in that mode, rather than by indictment. It

The Evansville, Rockport and Eastern Railway Company v. Harrington.

follows, the affidavit and information being otherwise good, that the court erred in its ruling upon the motion to quash.

Judgment reversed, with costs, and with instructions to overrule the motion to quash.

82	534
146	440

No. 9533.

THE EVANSVILLE, ROCKPORT AND EASTERN RAILWAY
COMPANY v. HARRINGTON.

NEGLIGENCE.—*Question of Fact.—Evidence.—Supreme Court.*—In an action for an injury alleged to have been occasioned by the negligence of the defendant's servants and employees, the fact of such negligence and whether any fault of the plaintiff contributed to the injury, are questions for the jury, and where the evidence, in such case, though conflicting, tends to support the verdict, the Supreme Court will not disturb it.

From the Warrick Circuit Court.

A. Iglehart, J. E. Iglehart, — Armstrong and — Cochran, for appellant.

E. Gough, for appellee.

BICKNELL, C. C.—The appellee brought this suit against the appellant, claiming damages for injuries sustained in being shaken from the rear platform of one of the appellant's cars, through the negligence of appellant's servants, in starting the car while the appellee was getting off, at Booneville, his place of destination.

The complaint contained the averment that the plaintiff was without fault.

The defendant answered by a general denial; the issue was tried by a jury, who found for the plaintiff \$150.

The defendant moved for a new trial, alleging that the verdict was not sustained by sufficient evidence, and was contrary to law and the evidence. This motion was overruled and judgment was rendered upon the verdict. The defendant appealed.

Martin v. Prather.

The only error assigned is that the court erred in overruling the motion for a new trial, and the only point, made and discussed in the appellant's brief, is that the evidence was insufficient to support the verdict.

The appellant's counsel say: "It" (the injury) "was manifestly his" (the plaintiff's) "own fault; the uncontradicted evidence shows a clear case of contributory negligence."

The questions, whether the injury was done by the negligence of the appellant's servants, and whether any fault of appellee contributed thereto, were questions for the jury; by their verdict they found, on both questions, against the appellant; there was conflicting testimony, but there was evidence tending to support the verdict.

Such being the case, this court can not set the verdict aside upon the mere preponderance of the testimony. *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73; *Jordan v. D'Heur*, 71 Ind. 199; *Talbott v. Kennedy*, 76 Ind. 282; *Floore v. Steigelmayer*, 76 Ind. 479; *Locke v. Falk*, 76 Ind. 520; *Abshire v. Williams*, 76 Ind. 97.

The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 9444.

MARTIN v. PRATHER.

82	535
151	22

JUDGMENT.—*Justice of the Peace.—Transcript Filed More Than Ten Years After Rendition.—Sheriff's Sale of Land not Void, but Voidable Only.*—A sheriff's sale of lands under an execution issued upon a transcript of a judgment of a justice of the peace, filed more than ten years after its rendition, is not void for want of revival and leave of court, but is voidable only in a direct proceeding by the execution defendant, instituted before the sale.

Martin v. Prather.

SAME.—*Lien.—Sale.*—Although, under section 614, R. S. 1881, such a judgment may not become a lien upon the real property of the defendant, there may be a valid sale of the land to an innocent purchaser to satisfy it.

SAME.—*Certificate of Justice and Affidavit of Non-Payment.—Presumption.*—It will be presumed in aid of such sale, the contrary not appearing, that the necessary certificate of the justice and affidavit of the plaintiff, or his agent, were filed before issuing the execution.

From the Morgan Circuit Court.

G. A. Adams and J. S. Newby, for appellant.

W. S. Shirley, for appellee.

FRANKLIN, C.—Appellant sued appellee to set aside a sheriff's sale of a tract of land to appellee, alleging that the judgment was void upon which the execution issued under which the land was sold.

A demurrer to the complaint was sustained; the plaintiff refused to amend, and judgment was rendered on the demurrer, for appellee for costs.

The sustaining of the demurrer to the complaint is the only error assigned.

The complaint alleges that on the 3d day of February, 1863, a judgment was rendered before a justice of the peace in said county, against the plaintiff, for the sum of \$60; that on the 29th day of April, 1879, a transcript of the same was filed in the clerk's office of said county; on the 15th day of May, 1879, an execution was issued thereon, and placed in the hands of the sheriff of said county, who levied the same upon said real estate (describing it), and sold the same to appellee on the 30th day of August, 1879; that prior thereto said judgment had not been revived; that the sale was made upon a void judgment, and prays to have it set aside and held for naught.

Appellant insists that the judgment could not be made a lien upon real estate after ten years had expired since its rendition, by a transcript thereof being filed and recorded in the clerk's office, and that all the proceedings thereafter had thereon were absolutely void, and conveyed no title to the land sold.

Martin v. Prather.

True, the filing of a transcript after the ten years had expired would not make the judgment a lien upon real estate, but, notwithstanding this, the judgment, for that reason, was not void or satisfied; it remained valid, and could be enforced at any time within twenty years from its rendition.

The statute of ten years limitation upon the liens of judgments is only intended to protect parties purchasing, or liens thereon, and does not prevent the sale of lands after the ten years to satisfy the judgment.

The record not showing the contrary, the presumption is that the necessary certificate of the justice and affidavit of the execution plaintiff were filed before issuing the execution; though if not, the issuing of an execution by the clerk, upon a transcript of a judgment before a justice of the peace, without the necessary certificate, that an execution had been issued by the justice, and returned no property found, and the affidavit of the judgment plaintiff, or his agent, that the judgment was unpaid, in whole or in part, and stating the amount due, according to the 541st section of the code, would certainly be irregularities that the judgment defendant might have stopped and remedied at any time before the sale. In this case the purchaser at the sale was a stranger to the judgment. The execution is presumed to be regular upon its face, and the purchaser is not chargeable with any irregularities in its issuing, and as to such irregularities he is an innocent purchaser, and the sale is valid. *Doe v. Harter*, 2 Ind. 252, and authorities therein cited; *Doe v. Dutton*, 2 Ind. 309; *Mavity v. Eastridge*, 67 Ind. 211.

We think these cases settle everything connected with this question against appellant, and hold that these proceedings are only voidable, and not void; and if not interfered with before the sale, it is valid.

And this conclusion is fully sustained by Freeman on Executions, section 29. See also the case of *Bagley v. Ward*, 37 Cal. 121.

The fact that no steps were taken to prevent the sale raises

State, ex rel. Beaver, v. Bottorff.

a presumption that the judgment remained unpaid, and no equity appears in the appellant's claim.

There was no error in sustaining the demurrer to the complaint. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is in all things affirmed, with costs.

88	538
125	597
82	538
148	552

No. 9436.

STATE, EX REL. BEAVER, v. BOTTORFF.

BASTARDY.—*Evidence.*—Where, in a prosecution for bastardy, the relatrix introduces evidence tending to prove efforts on the part of the defendant, after knowledge of her pregnancy, to induce the marriage of the relatrix to another man, the defendant may prove that he, in fact, discouraged such marriage.

NEW TRIAL.—*Surprise.*—A motion for a new trial, based upon affidavits showing surprise by the adversary's evidence, and a belief that upon another trial proof can be procured to overthrow such evidence, should not be granted, unless it appear that such countervailing proof could not have been obtained at the time or by a short delay of the trial, and that delay for that purpose had been requested.

From the Warren Circuit Court.

J. McCabe and *C. M. McCabe*, for appellant.

J. M. Rabb and *M. Milford*, for appellee.

MORRIS, C.—This was a prosecution for bastardy, based upon the affidavit of the relatrix, Lucretia E. Beaver. In the circuit court, the cause was submitted to a jury, who returned a verdict for the appellee, upon which the court, over a motion for a new trial made by the relatrix, rendered judgment in his favor.

The relatrix appeals to this court, and assigns as error the overruling of her motion for a new trial.

State, ex rel. Beaver, v. Bottorff.

Upon the trial of the cause in the circuit court, the relatrix testified that she had been delivered of a bastard child; that she was, at the time it was begotten, unmarried, and that the appellee was the father of the child, that she had been living with the appellee about a year; that the child was begotten about the 5th of December, 1879, and that it was born on the 13th of August, 1880; that the appellee came to her room on the 5th of December, 1879, in the night, and said he would have what he wanted or her life; that his wife was not at home; that there were two young men in the house, Waldress and William Bottorff. She further testified as follows: "I was awakened in the night; I asked who was there; Jacob Bottorff said, 'Me. You might as well give up to me, for I am bound to have it or your life.' I said, 'for God's sake go away.' I spoke very loud; I screamed it; he got in bed with me and I gave up to him." She further testified that Bottorff and his wife found out that she was in a family way in about a month; that Bottorff told her that Charles Beaver was a nice young man; that Beaver came to see her for the first time, January 18th, 1880, and that she married him February 19th, 1880; that the first time Beaver came to see her, the appellee and his wife asked her if he had said anything about marrying; that she answered "no;" that they then told her, that, if he said nothing about it the next time, she must; that Beaver came to see her three times. She then testified further as follows: "Mr. Bottorff never told me that Charles Beaver was of no account, nor that he had a bastard child by another girl; I never had such a conversation with him, but he always urged me to marry him."

Charles Beaver, the husband of the relatrix, testified that the appellee invited him to come and see the relatrix; told him that she was a good girl; that he was living a dog's life while single; that he need not come to see the girl more than twice, as they knew each other to be all right; that he was ignorant of the relatrix's condition at the time he married

her ; that he has continued to live with her and never mentioned the matter to the appellee.

The appellee testified, over the objection of the appellant, as follows: "I had a conversation with the relatrix, Lucretia Beaver, in my house, in the presence of Harriet Courtney, my mother, about the said Lucretia getting married; I told her she had better get better acquainted with Beaver before she married him; that I did not think him of much account; that I had heard that Beaver had had a child by another girl; I said to her that she was her own boss, and could do as she pleased; she said 'yes,' and that she intended to marry him."

The admission of this testimony on the part of the appellee is one of the grounds urged for a new trial.

The appellant's counsel insist, with much apparent earnestness and confidence, that the court erred in the admission of this testimony. They say that it is not competent as an admission, because the relatrix was not a party to the suit; that, as impeaching testimony it was incompetent, because the proper foundation had not been laid for its introduction, and because it related to matter altogether collateral to the issues in the case. It is not probable that the testimony was offered or admitted merely as an admission of the relatrix, nor for the purpose of impeaching her as a witness on the ground that she had made statements inconsistent with her testimony.

The relatrix had testified that the appellee knew her condition soon after the child had been begotten, and that, with such knowledge, he urged her to marry Beaver. She testified to several facts and circumstances tending to show great anxiety on the appellee's part to get her married off as soon as possible. The husband testified that the appellee had invited him to see the relatrix, told him that she was good, and that two visits would be enough. All this testimony was relevant and proper. It tended strongly to corroborate the main facts testified to by the relatrix, and to give probability to her testimony generally. If the appellee was the father of the child,

State, *ex rel.* Beaver, v. Bottorff.

he would, probably, have been anxious to secure the marriage of the mother as soon as possible, with the hope of imposing the spurious child upon the husband as his own, prematurely born, but begotten in due time. If it was competent for the prosecution to prove that the appellee anxiously encouraged the speedy marriage of the relatrix, for the purpose of giving probability to the charge, it was equally competent for the appellee to prove that he had not urged, but discouraged, her marriage. If, as he swears, he told the relatrix not to marry Beaver until she knew more about him, that he did not think Beaver of much account, and that he had heard that he had a child by another girl, such statements were competent to go to the jury as original evidence, tending to disprove facts sought to be established by the prosecution. Statements, thus made to the relatrix, were facts competent to go to the jury, not as admissions made by either party, nor as impeaching testimony, but as original evidence tending to meet and overcome important and pertinent testimony put in by the prosecution. The statements testified to by the appellee were verbal acts, material to the question before the jury, and therefore competent. The court did not err in the admission of this testimony.

On the trial of the cause, a Dr. Osburn, a witness produced by the appellee, testified that at the time the child is alleged to have been begotten, the appellee was suffering from a concussion of the spine, from atrophy of the testicles, and from general debility; that he had, shortly before, used phosphorous and other medicines upon him, with a view to excite his genital organs, but had failed.

It is claimed that this testimony took the appellant by surprise; that Dr. Osburn had testified fully upon a former trial of the cause, and had not, in his former testimony, mentioned, or even alluded to, the ailments above stated. Affidavits of the relatrix, her husband, her counsel, and one Dr. Beason were filed with the motion for a new trial. These affidavits stated that Osburn had testified on a former trial of the cause,

State, ex rel. Beaver, v. Bottorff.

but had not mentioned or alluded in his former testimony to the fact that the appellee was suffering from an affection of the spine, or from atrophy of the testicles, nor that he had administered phosphorus or other medicines to him for the purpose of exciting his genital organs. The affidavits of the relatrix and her counsel stated that they were taken by surprise by the Doctor's testimony, and that if a new trial should be granted, they believed they could show by a personal examination of the appellee, that the Doctor's testimony was false.

There was no reason shown why a medical examination of the appellee could not have been made at the time of the trial, and the result put in evidence in rebuttal. The appellant examined several witnesses, Dr. Beason among them, in rebuttal, and after Dr. Osburn had testified. The appellee, as well as medical witnesses, seems to have been present at the trial, and would, for aught that appears, have been willing to submit to any proper personal examination. The appellant had, after hearing Osburn's testimony, sufficient opportunity to meet it. If the appellant, after hearing his testimony, chose to submit the case upon the testimony before the jury, without an attempt to refute or answer the testimony of Dr. Osburn, it is now too late to complain. Had the appellant, if taken by surprise, asked the court to delay the trial, if time was necessary to procure evidence to meet that which is claimed to have taken the relatrix by surprise, such delay would, doubtless, have been granted. Nothing of the kind was attempted. It does not appear that any delay was desired. From the whole record, we think it may be fairly inferred that the appellant might have been as well prepared to meet Dr. Osburn's testimony on the trial, as at a subsequent time. There was no error in overruling the motion for a new trial.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

The State, *ex rel.* Ulen, *v.* Pavey.

No. 5216.

THE STATE, EX REL. ULEN, *v.* PAVEY.

BASTARDY.—Limitation of Action.—Infant.—A prosecution for bastardy must be commenced within two years from the birth of the child, notwithstanding the relatrix is an infant.

From the Madison Circuit Court.

W. R. Pierse, for appellant.

C. L. Henry, for appellee.

WOODS, J.—Bastardy. The defendant answered that the prosecution had not been instituted within two years from the birth of the child.

The reply to this was that the relatrix was an infant, and that the prosecution was commenced before she became twenty-one years old. To this reply the court sustained a demurrer, and we are of opinion that the decision was right.

Section 18 of the act of May 6th, 1853, for the regulation of prosecutions of this kind, R. S. 1881, sec. 995, expressly declares that no prosecution under the act shall be instituted after two years from the birth of the child. It is claimed, however, that this should be construed in connection with section 215 of the code, R. S. 1881, sec. 296, which reads: "Any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed." But, on the contrary, section 212 of the code, R. S. 1881, sec. 294, declares that, "In special cases, where a different limitation is prescribed by statute, the provisions of this act" (the code) "shall not apply."

Besides, it may be observed, that, in a prosecution for bastardy, the State is the plaintiff, not the relatrix; and the action is not her's or for her benefit, but for the support of the child. *The State, ex rel., v. Smith*, 55 Ind. 385.

Judgment affirmed, with costs.

Parkham v. Vandeventer.

No. 9724.

PARKHAM v. VANDEVENTER.

JUDICIAL SALE.—Wife's Inchoate Interest in Real Estate Sold on Execution.—Statute Construed.—Mortgage.—Constitutional Law.—The inchoate interest of a married woman in the lands of her husband, not exceeding \$20,000, does not become absolute under the act of 1875, sections 2508 and 2509, R. S. 1881, when sold upon a judgment rendered since the act took effect foreclosing a mortgage executed by the husband alone before the passage of the law; such act, as applied to such contracts, would impair their obligation, and it can not be held to embrace them.

From the Greene Circuit Court.

E. E. Rose and *E. Short*, for appellant.

W. J. Baker and *L. Shaw*, for appellee.

BEST, C.—The appellant brought this action for the partition of eighty acres of land, alleging in her complaint that she was the owner in fee of one-third, and the appellee the owner of the residue of the land.

The second paragraph of the answer averred, in substance, that one Allen Parkham, the appellant's husband, was the owner of the land, and on the 28th day of March, 1870, he executed a mortgage upon the south half of it to the State of Indiana, for the benefit of the school fund, to secure a note of \$75, and on the 15th day of December, 1873, he executed a mortgage upon the whole of it to Jacob Holmes, to secure notes, amounting in the aggregate, to \$1,146; that on the 4th day of April, 1877, the auditor of said county, by virtue of the power contained in the mortgage executed to the State, duly sold thirty acres, a part of the south forty, to Jacob Holmes; that the other mortgage was duly foreclosed against said Allen Parkham, in June, 1876, and on the 4th day of November, 1876, upon an order of sale issued upon said decree, the whole of the land was duly sold to said Jacob Holmes, who, after the sheriff had made him a deed, conveyed the land to the appellee; that Allen Parkham is still living, and that the appellant has no interest in the land other than as his wife.

Parkham v. Vandeventer.

A demurrer was overruled to this answer. Substantially the same facts were averred in the reply, to which a demurrer was sustained, and these rulings are assigned as error.

The question presented is whether the inchoate interest of a married woman in the lands of her husband, not exceeding in value \$20,000, becomes absolute under the act of March 11th, 1875, when sold upon a judgment, rendered since the act took effect, foreclosing a mortgage executed by the husband alone, before the passage of the law.

It is insisted that the statute, as applied to sales on judgments rendered upon mortgages executed by the husband before the passage of the law, is void as being in conflict with the provisions of the Federal and State constitutions forbidding the passage of any law impairing the obligation of contracts. Const. U. S., art. 1, section 10; Const. Ind., Bill of Rights, section 24.

This view was adopted by the court below, and we are of opinion that the statute can not be upheld as applied to such contracts. The execution of the mortgage gave the mortgagee a vested interest in the mortgaged premises that can not be divested by an act of the Legislature without impairing the obligation of the contract. This precise question was decided by this court in the case of *Hoskins v. Hutchings*, 37 Ind. 324, as applied to a statute which enlarged the rights of the wife in a similar way. Prior to the code of 1852, a wife was entitled to a dower interest in one-third of the land of her husband in the event that she survived him, and by the code it was increased to one-third in fee simple. Before the code was adopted, a husband executed a mortgage upon his land in which his wife did not join, and after its adoption he died. The mortgage was then foreclosed, the land purchased under the decree, and the question arose whether the wife was entitled to one-third of it in fee simple under the code of 1852. Upon that question this court said: "In principle, we think this question is decided in *Strong v. Clem*, 12 Ind.

Parkham v. Vandeverter.

37, and the cases following it. It is true that in those cases the fee simple had been conveyed by the husband; while in this there was only a mortgage executed by him on the land. But when this mortgage was executed, it gave the creditor a valid lien on the land, subject only to the contingent right of the wife to dower in the same, in the event that she should survive her husband. We can not see how the Legislature could increase the interest of the wife, and in the same proportion diminish that of the mortgagee, without incurring the charge of having impaired the obligation of the contract. The creditor has here a specific lien upon the mortgaged premises, which can not be taken away from him, without an evident infraction of the constitution of the United States, and a violation of a plain principle of justice and right. Const. U. S., art. 1, sec. 10."

When the mortgage in this case was executed, it gave the mortgagee a valid lien upon the land, subject to the contingent interest of the wife to one-third of the land in fee simple, in the event that she survives her husband, and the Legislature can not increase her interest and thus diminish the interest of the mortgagee without impairing the obligation of the contract. This proposition is plain and needs no discussion. The same thing, in principle, has several times been decided by this court. *Lewis v. Brackenridge*, 1 Blackf. 220 (12 Am. Dec. 228); *Hopkins v. Jones*, 22 Ind. 310; *Scobey v. Gibson*, 17 Ind. 572.

The appellant, however, insists that the cases of *Taylor v. Stockwell*, 66 Ind. 505, and *Hollenback v. Blackmore*, 70 Ind. 234, decide this question the other way. In the latter case, this question was not considered. It was conceded that the wife's interest in lands mortgaged by the husband before the law was enacted, upon a foreclosure and sale of them afterward, became absolute, and the only question presented was when, whether at the date of the sale or at the expiration of the year for redemption, and the court held that, as the title of the debtor vested in the purchaser as of the date of the sale,

Parkham v. Vandeventer.

the inchoate interest of the wife became absolute at the same time. The court, in reaching its conclusion, assumed that the inchoate interest of the wife in such case becomes absolute upon a sale of the property, but as the constitutionality of the act was not considered, the case can not be regarded as a decision of this question.

The case of *Taylor v. Stockwell*, 66 Ind. 505, did not involve the same question. It involved the constitutionality of the act so far as prior contracts generally are concerned, but did not involve any such question where specific liens had been acquired. There is, of course, a marked distinction between them, and that case does not decide, nor does it attempt to decide, the question here presented. Neither of these cases, therefore, can be regarded as deciding this question the other way.

Another view seems equally decisive of this question against the appellant. The second section of the act provides that its provisions shall not apply to sales made upon judgments rendered prior to the time that the act takes effect. These judgments, as a general rule, create nothing but general liens, that may be regulated at the will of the Legislature, depending, as they do, upon statute, and not upon contract, and since the Legislature declares that the act should not apply to sales made to enforce such liens, it should be construed so as not to apply to sales made to enforce specific liens acquired before the law took effect. It is not reasonable to suppose that the act was intended to apply to sales made to enforce specific liens, when, by its terms, it does not apply to sales made to enforce general liens.

For these reasons, we think, the court did not err in its rulings, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Fullen v. Coss.

No. 7909.

FULLEN v. COSS.

INSTRUCTIONS.—*Supreme Court.*—*Harmless Error.*—Where an instruction to the jury assumes a fact in issue to be true, and the evidence (all of which is not in the record) shows that such fact was established in proof, without any countervailing evidence appearing, the error is harmless, and not available in the Supreme Court. WORDEN, C. J., dissents.

From the Montgomery Circuit Court.

R. B. F. Peirce, for appellant.

M. Thompson and *W. H. Thompson*, for appellee.

BLACK, C.—The appellee sued the appellant for breach of a contract to marry.

There was an answer of general denial. There was also a second paragraph of answer, which alleged that the appellant was under the age of twenty-one years at the time the contract mentioned in the complaint was alleged to have been made; and a third paragraph alleged that he was under the age of twenty-one years when the contract was alleged to have been made, and that after becoming of age he disaffirmed the contract mentioned in the complaint.

The appellee replied to the second and third paragraphs of the answer by a general denial, and by a paragraph in which she alleged that the appellant, after he attained his majority, and became twenty-one years of age, affirmed the contract mentioned in the complaint, and agreed to ratify the same, and expressly promised and agreed to execute the contract of marriage on his part.

Upon a trial of the issues thus formed, there was a verdict for the appellee, on which judgment was rendered, a motion for a new trial having been overruled.

A number of errors have been assigned, but counsel for appellant, in his brief, has argued only concerning a certain instruction to the jury, the giving of which was one of the causes stated in the motion for a new trial.

This instruction was as follows:

"Gentlemen of the jury:—The evidence in this cause shows that the contract of marriage between these parties was entered into at a time when the defendant was under the age of twenty-one years, and, to entitle the plaintiff to recover, it must be shown that the defendant, after he arrived at the age of twenty-one years, ratified the contract previously made. This need not be shown to have been done in express terms, but may be inferred from facts and circumstances in the case, and by the conduct of the defendant, as that he continued his visits and attentions in such a way as to indicate to her and to satisfy you that he intended to carry out the contract previously made."

Counsel for appellant says that this instruction assumes to state what the evidence establishes; that it assumes that a marriage contract was entered into by the parties at a given time; that the state of the pleadings placed the burden of proving the existence of the contract to marry upon the appellee; and he claims that the court had no right to tell the jury that the evidence established that necessary fact, which was a matter for the jury alone to determine.

There is a bill of exceptions, in which it is stated that certain evidence contained therein was all the evidence given in the cause; but it appears from the bill itself that this statement is not true. It is said in the bill that certain letters were shown to a witness, the appellee, and identified by her, and that they were read to the jury, but they are not set out in the bill. In a parenthesis it is said that they were never filed in the clerk's office.

The court, in instructing the jury, should not state that the evidence establishes a fact which is in dispute; but when the evidence, without conflict, unquestionably establishes the existence of a fact, it can not, by way of claim that a party has been injured by the instruction, be said to be a disputed fact for the purposes of this rule, though it be a fact in issue in

Marquess v. La Baw.

the pleadings, for, in such case, it can not be said that any injury has been done by the court's assumption.

By the well settled practice of this court, where all the evidence is not in the record, if, in any state of the evidence supposable under the issues, the instruction given could have been correct, the existence of such a state of the evidence will be presumed. *Miller v. Voss*, 40 Ind. 307; *Keating v. State, ex rel.*, 44 Ind. 449; *Byram v. Galbraith*, 75 Ind. 134; *Ohio, etc., R. W. Co. v. Nickless*, 73 Ind. 382.

All the evidence in the record sustains the statement of the court in question, and we must presume that the remainder of the evidence was to the same effect.

The mode of instruction here adopted is unsafe, and not to be commended in general, yet, as the court assumed a fact which could not properly be called a disputed one, the appellant was not injured. *Bowen v. Pollard*, 71 Ind. 177.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at appellant's costs.

WORDEN, C. J.—I do not concur in the affirmance upon the ground stated in the foregoing opinion.

82	550
125	399
126	53

No. 9411.

MARQUESS v. LA BAW.

GUARDIAN AND WARD. — *Maintenance of Ward. -- Management of Ward's Estate.*—A complaint to set aside a guardian's current and final reports alleged that the ward resided with the guardian as a member of his family and labored for him to the value of \$10 per month, all of which the guardian in his reports concealed from the court, and charged the ward \$566 for his board; that the guardian received sums of money specified, of the ward's estate, which could have been loaned at 10 per cent., some of which he mingled with his own and loaned, but gave the ward no credit for interest.

Held, that the complaint was good on demurrer.

Marquess v. La Baw.

SAME.—*Ward.—Member of Guardian's Family.*—It is a general rule, subject to exceptions, that a guardian who makes his ward a member of his family, and receives the ward's labor as such, can not charge for his board.

SAME.—A guardian must use reasonable prudence and ordinary diligence in managing his ward's estate, and is liable for such loss as results from a failure to do so.

PRACTICE.—*Pleading.—Uncertainty.*—Uncertainty in a pleading is not reached by demurrer, but by motion.

SAME.—*Set-Off.*—Set-off can not be pleaded to a complaint to set aside a guardian's report.

SUPREME COURT.—*Judgment.*—When no objection is made below to the form of the judgment, none can be made in the Supreme Court.

From the Fountain Circuit Court.

M. Milford and H. H. Stilwell, for appellant.

H. H. Dochterman, for appellee.

ELLIOTT, J.—The appellee instituted this proceeding to set aside current and final reports made by appellant as his guardian.

As grounds for the relief sought the complaint alleges that the appellant charged the appellee for board the sum of \$566 although he, the appellee, was then living with the former as a member of his family and was so regarded and treated; that the appellee was capable of earning money by labor; that he did labor for the appellant at his request, and that the labor performed for him was of the reasonable value of ten dollars per month; that in his reports the guardian concealed from the court the fact that the ward was living with him as a member of his family, and that he had labored for him. It is further charged that the guardian received divers sums of money (the dates and amounts are fully stated); that he could have loaned the money at ten per centum interest; that he did, in fact, mix some of the ward's money with his own, lend it and neglect to account for the interest received.

A complaint is sufficient if it contain facts constituting a cause of action and entitling the plaintiff to some relief, although some of the facts stated may not be sufficient in

Marquess v. La Baw.

themselves, and the entire relief prayed may not be proper. In other words if a complaint is good in part and is sufficient to entitle the plaintiff to some relief, it will repel a demurrer. *Teal v. Spangler*, 72 Ind. 380; *Bayless v. Glenn*, 72 Ind. 5. If it were conceded that some parts of a complaint are insufficient it will not avail an appellant if facts enough can be extracted from it to entitle the appellee to some relief.

We have no doubt as to the sufficiency of the complaint before us. If, as the appellee affirms and the demurrer concedes, the ward was a member of his guardian's family and was so received and treated, the latter had no right to charge him for board. The general rule is that a guardian can not exact money for the board of a ward whom he makes one of his family. *Myers v. State, ex rel.*, 45 Ind. 160; *State, ex rel., v. Clark*, 16 Ind. 97. The general rule is as we have stated, but like most general rules there are exceptions. Where the guardian has no estate and is unable to maintain his ward, and the latter is possessed of an adequate estate and unable to earn his own support, then the guardian may charge for his support. *Corbaley v. State, ex rel. Holmes*, 81 Ind. 62. The present, as the complaint affirmatively shows, is not such a case. It is very fully shown that the guardian was possessed of a large estate, the ward of a very small one, and that he was capable of earning his own support by his labor. Where the ward is received as a member of the guardian's family, there is no implied obligation to pay for board furnished, and on the other hand no obligation to pay for services rendered. *Clark v. Casler*, 1 Ind. 243; *Resor v. Johnson*, 1 Ind. 100; *Webster v. Wadsworth*, 44 Ind. 283; *Brown v. Yaryan*, 74 Ind. 305. Within that rule this case falls.

It is the duty of a guardian to keep his ward employed, when he is of suitable age and capacity, in order that he may earn his support and not exhaust his estate in his maintenance. *Brown v. Yaryan, supra*; *Clark v. Clark*, 8 Paige, 152 (35 Am. Dec. 676).

It was certainly a gross breach of duty in the appellant to

Marquess v. La Baw.

appropriate the services of his ward and still hold him accountable for board furnished. In reporting himself entitled to compensation, and concealing the fact that his ward was not only capable of supporting himself, but was in fact rendering services of great value, the guardian committed a wrong which fully justified the ward in invoking the assistance of the court.

In managing the estate of his ward, a guardian is required to exercise reasonable prudence and ordinary diligence. For a negligent failure, he is responsible to the extent of the loss which results to the estate of his ward. It was said in *State, ex rel., v. Womack*, 72 N. C. 397, that "a guardian is liable not only for what he does receive, but for what he ought to receive;" and this doctrine is approved in *Bescher v. State, ex rel.*, 63 Ind. 302. It is said by a respectable writer, that a guardian is bound to "exercise the same prudence and foresight which a good business man would use in the management of his own fortunes, though under more guarded restraints." Schouler Domes. Rel. 461. If, as the appellant's demurrer concedes, he could have loaned the ward's money in his hands at ten per centum, and did not, he ought to make proper reparation; or, if he himself used the ward's money, which could have been safely invested by the use of reasonable diligence, he should account for a just rate of interest. The case is still stronger if we treat the allegations of the complaint as charging that appellant did mix the ward's money with his own, and put it out at interest.

It is objected that the allegations of the complaint are indefinite and uncertain. Granting that there is some uncertainty, it will not profit the appellant, for his remedy was by motion and not by demurrer.

The court below did not err in sustaining the demurrer to the appellant's plea of set-off. A set-off is not a defence to a proceeding to set aside a report made by a guardian.

The evidence is not in the record, nor is there any special finding of facts, and we can not ascertain whether the finding

Hallowell v. Guntle.

was contrary to law. There is nothing upon which to base a claim that the court did not decide according to law. In the absence of the evidence, it can not be determined whether the court did or did not err in applying the law to the facts. *Bos-seker v. Cramer*, 18 Ind. 44; *Robinson, etc., Works v. Chandler*, 56 Ind. 575. It is incumbent upon a party who alleges error in the proceedings of the trial court, to present such a record as affirmatively shows its existence. In the absence of such a showing, all reasonable presumptions will be indulged in favor of the judgment appealed from.

No objection was made to the form of the judgment in the court below, and none can be successfully urged here. *Bayless v. Glenn, supra*; *Floore v. Steigelmayer*, 76 Ind. 479; *Adams v. LaRose*, 75 Ind. 471.

Judgment affirmed.

88 554
197 239

No. 8577.

HALLOWELL v. GUNTLE.

SLANDER.—Evidence.—Whoredom.—General Character.—Particular Acts.—Mitigation of Damages.—In an action for slanderous words imputing to the plaintiff whoredom with a particular man, the general bad character of the plaintiff for unchastity may be proved in mitigation of damages, but not particular acts of whoredom with other men, in either mitigation or justification.

SAME.—Presumption.—Instructions.—Reputation.—In an action for slander, it is not error to instruct that a person, against whom a charge of whoredom has been made, is presumed to be innocent until the contrary is shown by a preponderance of the evidence; nor that if the plaintiff's reputation for chastity had not been called in question in the neighborhood of her residence, it was evidence of her good reputation in that respect; nor that if her reputation for chastity was bad, it was no defence to the action, but was to be considered in mitigation of damages.

SAME.—Evidence.—In an action for slander, it is not necessary to prove the precise time when the words were spoken.

From the Clinton Circuit Court.

Hallowell v. Guntle.

E. Sparks, F. M. Goldsberry, T. H. Palmer and D. S. Holman, for appellant.

J. W. Clements, P. H. Dutch, W. R. Stokes and J. E. Moore, for appellee.

WOODS, J.—Action for slander and libel; verdict and judgment for the plaintiff; error assigned on the overruling of the motion for a new trial.

The evidence is not in the record, and the bill of exceptions is not framed according to the 347th section of the code, R. S. 1881, section 630, for presenting reserved questions; consequently some of the points discussed are not before us.

The alleged slanderous words were to the effect that the plaintiff, an unmarried woman, had been guilty of acts of whoredom with defendant. The defendant pleaded the general issue and justification, and on the trial offered to prove in defence, and in mitigation of damages, that the plaintiff had committed particular acts of whoredom with other men named. The court properly excluded this evidence. It did not tend to prove the justification, and was not admissible in mitigation of damages. The general bad character of the plaintiff, in respect to chastity, may be proved in mitigation, in such a case, but not particular acts of unchastity which do not come within the plea of justification. 1 Greenl. Ev., section 55; 2 Greenl. Ev., sections 421, 424, and notes. The familiar reason for the rule is, that a party is presumed to be always ready to defend his general character, but can not be called on to meet a particular charge not directly involved in the issue.

The court instructed the jury that the plaintiff need not prove "the precise time" when the words were spoken. There was no error in this. *Smith v. Smith*, 76 Ind. 356. It is suggested that, under this instruction, words spoken after the commencement of the action might have been proven as the cause of action; but the instruction does not mean that, and, in the absence of the evidence, it will be presumed that there was no such proof admitted.

Hallowell v. Guntle.

The court also instructed "that the person against whom the charge (of whoredom) is made, is presumed to be innocent until the contrary is proved by a preponderance of the evidence." Counsel insist that there is no legal presumption about it, and that the instruction "deprived the jury of the right to consider any evidence of the guilt of the plaintiff."

Greenleaf, vol. 2, section 419, says: "In ordinary cases, under the general issue, the plaintiff will not be permitted to prove the *falsity* of the charges made by the defendant, either to show malice, or to enhance the damages; *for his innocence is presumed.*" The rule is, and the instruction well enough expresses it, that in such a case, in the absence of contrary evidence, the jury will presume the plaintiff's character to be good, the burden of proof on the subject being on the defendant.

In one of its charges, the court said: "The fact, if true, that the plaintiff's reputation for chastity had not, or has not, been called in question in the neighborhood in which she resides, is evidence that her reputation in that respect is good." We recognize fully the rule that the jury must determine the weight of evidence, and what in the particular case it tends to prove or does prove; but we do not consider that this charge is substantially inconsistent with that rule. It does not mean that the fact suggested was *proof* of good reputation; it certainly was *evidence* of it, and the judgment can not be reversed because the court said so. It will be presumed, the record not showing the contrary, that there was evidence which made the instruction relevant.

The court instructed further that if the jury found "that the plaintiff's reputation for chastity was bad, still, that is no defence to this action, but is to be considered by you in mitigation of damages." Counsel say: "Whatever tends to mitigate the damages in such a case as this is a defence *pro tanto*, to the action, and the court erred in saying," etc.

This is a dispute about words—mere logomachy. The instruction could not have misled the jury, and, as we conceive, is technically right in the respect in which it is criticised.

Martin v. Prather.

Counsel claim further that the instruction is wrong in respect to the preponderance of evidence, and argue that if there was any evidence of bad character, it should, so far as it went, though not a preponderance, go in mitigation of damages. *Shoutly v. Miller*, 1 Ind. 544, is cited. The instruction does not say to the contrary, and if the appellant desired an instruction to that effect, he should have asked it.

The appellant complains of a remark made in the argument of the case before the jury by one of counsel for the appellee; and it is said that there was nothing in the evidence to justify it. The evidence, as already stated, is not in the record, and the question can not be considered.

Judgment affirmed, with costs.

No. 9443.

MARTIN v. PRATHER.

PARTITION.—*Wife's Inchoate Interest in Real Estate Sold on Execution.—Complaint.—Statute Construed.*—In an action for partition, under the act of March 11th, 1875 (R. S. 1881, sections 2508, 2509), by the wife of the judgment debtor, the complaint must show that the judgment was rendered subsequent to the taking effect of the act.

From the Morgan Circuit Court.

G. A. Adams and J. S. Newby, for appellant.

W. S. Shirley, for appellee.

FRANKLIN, C.—This is an action for partition, commenced by appellant against appellee as the purchaser at sheriff's sale of the interest of appellant's husband in certain real estate.

There was a demurrer filed, and sustained to the complaint. The only error assigned is on the ruling upon the demurrer.

The complaint does not give the date of the rendition of the judgment upon which the execution was issued, under which the land was sold. It shows that a transcript of a judgment from the docket of a justice of the peace, in said county,

McFadden v. The State, *ex rel.* Dykins, Auditor.

was filed in the clerk's office; execution issued thereon on the 29th day of April, 1879; the land was sold on the 30th day of July, 1879; appellee was the purchaser, and received his deed from the sheriff at the expiration of the year for redemption, and this suit was commenced January 21st, 1881.

The objection to the complaint is that it does not show that the judgment was rendered after the act of March 11th, 1875, took effect, vesting the inchoate interests of married women in the lands of their husbands, sold on judicial sale.

The second section of the act, 1 R. S. 1876, p. 554, provides that the provisions of the act shall not apply to sales of real estate upon judgments rendered prior to the taking effect of this act.

This second section must be regarded as a limitation upon the first section and not as an exception to it,—as a part of the enacting clause of the law limiting its entire operations to such sales only as are made upon judgments rendered after the act went into force. And a complaint that does not bring the case within this limitation of the statute, does not show a sufficient cause of action. There was no error in sustaining the demurrer to the complaint.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is in all things affirmed, with costs.

No. 9662.

McFADDEN v. THE STATE, EX REL. DYKINS, AUDITOR.

MORTGAGE.—*Promissory Note Annexed.—Evidence.*—A mortgage executed to secure a note attached to it is binding though the note is not signed; and there is no error in allowing the note to be read in evidence, it being a part of the mortgage.

From the Scott Circuit Court.

McFadden v. The State, *ex rel.* Dykins, Auditor.

W. K. Marshall and W. Trulock, for appellant.

C. L. Jewett and H. E. Jewett, for appellee.

BEST, C.—This action was brought by the State, on the relation of the auditor of Clark county, to foreclose a mortgage executed by Barney Miller and his wife, against the appellant as a subsequent purchaser with notice.

The mortgage was dated the 3d day of January, 1856; was for \$194, payable five years from date, with seven per cent. interest, and was in the identical form prescribed by the statute—1 R. S. 1876, p. 800—except that the fund was not described, and the note annexed was not signed at the bottom by Miller.

Issues were formed, trial had, finding made, and, over a motion for a new trial, judgment was rendered for the appellee.

The error assigned is that the court erred in overruling the motion for a new trial. The only reason embraced in the motion and mentioned in the brief of appellant is, that the court erred in permitting the note annexed to the mortgage to be read in evidence, "because the note was not signed by any person."

There was no error in this ruling. The mortgage provided that the sum secured by it was payable "according to the conditions of the note hereto annexed," and this note was annexed to the mortgage. Its blanks were filled, showing when interest commenced and when the sum secured by the mortgage matured, and it was, by the terms of the mortgage, a part of it. *Titlow v. Hubbard*, 63 Ind. 6.

Being a part of the mortgage, the appellee was entitled to read it in evidence, though it was not signed by Miller. The signature of Miller to the note would have rendered him personally liable for the debt, but the want of it in no manner impaired the validity of the mortgage, nor did it furnish any obstacle to its foreclosure. As the note was a part of the mortgage, it was immaterial whether it was written in the body of the mortgage, or below the signatures of the mortgagors,

 Baldwin *et al.* v. Shuter.

as in either case the execution of the mortgage would render the stipulations of the note binding.

Several reasons are urged why the finding is not supported by sufficient evidence, but, as a new trial was not asked for such reason, we can not consider them. There is no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at appellant's costs.

82	560
133	418
82	560
136	71
82	560
158	668

 No. 8928.

BALDWIN ET AL. v. SHUTER.

PROMISSORY NOTE.—*Payable to Order of Maker.*—*Forged Endorsement.*—*Negligence.*—*Burden of Issue.*—Where one is sued as the maker and endorser of a promissory note payable to his own order, and he answers, under oath, admitting that he made the note but denying that he had ever endorsed or transferred the note, as alleged, and averring that the endorsement is a forgery, the burthen of the issue is on the plaintiffs to show, by a preponderance of the evidence, the defendant's endorsement of the note; for, if the endorsement is a forgery, the defendant is not guilty of negligence in the negotiation of the note, and the plaintiffs are not innocent holders thereof for value.

PRACTICE.—*Weight of Evidence.*—*Supreme Court.*—Where there is evidence in the record tending to sustain the verdict, the Supreme Court will not disturb it on the mere weight of the evidence.

SAME.—*General Verdict.*—*Special Finding of Facts.*—*Judgment.*—If the special findings of the jury, on questions of fact submitted to them, can upon any hypothesis be reconciled with the general verdict, the latter will control, and the court will not render judgment against the party, who has in his favor the general verdict.

From the Dearborn Circuit Court.

D. H. Stapp and *C. W. Stapp*, for appellants.

W. W. Campbell, *O. F. Roberts* and *J. A. Parks*, for appellee.

Baldwin *et al.* v. Shuter.

Howk, J.—In this case the appellants sued the appellee, as the maker and endorser of a promissory note, executed by him, and payable to his own order at a bank in this State. The cause was put at issue and tried by a jury, and a general verdict was returned for the appellee. With their general verdict, the jury also returned into court their special findings on particular questions of fact submitted to them by the parties under the direction of the court, in substance as follows:

Appellants' interrogatories:

"No. 1. Did the defendant deliver the note in suit to the plaintiffs' endorser, McClay? Answer. Yes.

"No. 2. Were the plaintiffs purchasers of the note for value and before maturity, and without notice of any defence? Answer. Yes.

"No. 3. Is the note in suit the same note which was executed and delivered by the defendant, and which afterwards came into the hands of the plaintiffs? Answer. Yes.

"No. 4. What is the amount of the note, including interest and attorney's fees? Answer. \$234.61½.

"No. 5. What is a reasonable attorney's fee for the collection of the note in suit? Answer. \$20.00.

"No. 6. Was the note not indorsed in manner and form as it now is, before it came into the hands of the plaintiffs? Answer. No."

Appellee's interrogatory:

"Did the defendant, William Shuter, sign his name on the back of the note in suit, or authorize any one to do so for him? Answer. He did not."

The appellants moved the court for a judgment in their favor, on the special findings of the jury, notwithstanding the general verdict, which motion was overruled, and to this ruling they excepted. Over their motion for a new trial, and their exception saved, the court rendered judgment for the appellee, upon the general verdict.

Baldwin *et al.* v. Shuter.

The appellants have assigned, as errors, the following decisions of the circuit court :

1. In overruling their demurrer to the first paragraph of appellee's answer ;
2. In overruling their motion for a new trial ; and,
3. In overruling their motion for a judgment in their favor on the special findings of the jury, notwithstanding the general verdict.

We will consider and decide the several questions presented and discussed by the appellants' counsel, and arising under these alleged errors, in the order of their assignment.

1. In the first paragraph of his answer, the appellee alleged in substance, that he executed the note in the complaint mentioned, but that he never indorsed, or signed, or transferred such note by writing his name thereon, nor authorized any one else to do the same ; and that if his name was written on the back of said note, it was a fraud and a forgery, and not genuine ; that the consideration for the giving of said note was family medicines, prepared by a pretended Western Medical Works, situated in Indianapolis, Indiana, which were sold and delivered by said pretended Medical Works to the appellee ; that the said Medical Works, through their agent, who sold said medicines to appellee, at the time of the execution of said note, agreed that the note so executed was to be left at the First National Bank of Aurora, Indiana ; that whenever the appellee made sales of any of said medicines, he was to pay the same into said bank, which amounts were to be credited on said note, and if he failed to sell a sufficient amount of said medicines to pay off and satisfy said note, then the remainder of said medicines were to be delivered to said Medical Works, and they were to deliver up said note to the appellee ; that he had failed to sell any of said medicines, though he frequently offered the same for sale, and he still had the same ; that he had tendered all of said medicines to said Medical Works, and demanded his said note, and that he was still ready and willing to surrender said medi-

Baldwin et al. v. Shuter.

cines to said Medical Works, in accordance with their said contract; but the appellee averred, that the said Western Medical Works had sold and assigned the said note to the appellants, and wholly refused to comply with their said contract, so made and entered into, at the time of the execution of said note, and contemporaneous therewith. Wherefore the appellee said, that the note in suit was given without any consideration whatever, all of which the appellants knew prior to their purchase of said note; and that the appellants' endorser William P. McClay knew that said note, at the time of his endorsement thereof to the appellants, was given without consideration, and a forgery and a fraud upon the appellee.

This paragraph of answer was duly verified by the appellee.

We are of the opinion that the court did not err in overruling the appellants' demurrer to this paragraph of answer. If the appellee had endorsed the note in suit before maturity and before its delivery to the agent of the Western Medical Works, the facts alleged in the paragraph, in regard to the consideration of the note, might not have constituted a sufficient defence for the appellee, in a suit upon the note by innocent holders for value. But the note in suit was made payable to the order of the appellee; and in their complaint the appellants alleged, among other things, that, before the maturity of said note, the appellee endorsed the same to William P. McClay, etc. In the first paragraph of his answer, as we have seen, the appellee denied, under oath, the alleged endorsement of the note, and averred that such endorsement was a forgery. Without regard, therefore, to the allegations in relation to the consideration of the note, the paragraph of answer put in issue the alleged endorsement of the note by the appellee, and thus constituted a valid defence to the appellants' action. Under the allegations of the complaint, and the issue joined thereon by this paragraph of answer, it is very clear that the appellants could not recover in this action, until they had shown, by a preponderance of the evidence, that the appellee had, as alleged, endorsed the note in suit.

Baldwin et al. v. Shuter.

It is claimed by appellants' counsel, that the demurrer should have been sustained to this paragraph of answer, because the facts alleged therein show, as they say, that the appellee was guilty of negligence in signing and delivering the note in suit to a stranger. It seems to us, however, that if the facts stated in the answer are true, and the demurrer concedes their truth, the appellee was more careful and prudent than is customary in such cases, in that he made his note payable to his own order, and delivered the same, without his endorsement, to the "stranger." He thus prevented the appellants from successfully claiming that they were innocent holders for value of the note in suit; for such a claim can not be sustained, when it rests upon the forged endorsement of the appellee's name on such note. The appellants derive their title to the note through the appellee's alleged endorsement thereof; and if this endorsement was forged, it can not be said, we think, that appellee was guilty of negligence in the negotiation of the note, such as would make him liable to the holders thereof.

2. It is claimed by the appellants' counsel that the general verdict of the jury was not sustained by sufficient evidence, and was contrary to law. As already stated, the burthen of the issue, as to the alleged endorsement of the note, was on the appellants. On this issue, it is certain that there was evidence in the record tending to sustain the verdict. In such a case, it is well settled that this court will not disturb the verdict, on the mere weight of the evidence. The instructions of the court to the jury were, perhaps, more favorable to the appellants under the issues, than the law would warrant. The court did not err, we think, in overruling the motion for a new trial.

3. When all the special findings of the jury are considered, and construed together, as they must be, there was no such inconsistency between such special findings and the general verdict, as authorized the court to render judgment in the appellants' favor, on the former, notwithstanding the latter. It

McMahan *et al.* v. Newcomer *et al.*

is settled that if the special findings can, upon any hypothesis, be reconciled with the general verdict, the latter will control, and the court will not render judgment against the party who has the general verdict in his favor. In such a case, every reasonable presumption will be indulged by the court, in favor of the general verdict. *Ridgeway v. Dearing*, 42 Ind. 157; *McCallister v. Mount*, 73 Ind. 559; *Cook v. Howe*, 77 Ind. 442.

In the case at bar, the appellants' motion for a judgment in their favor, on the special findings of the jury, notwithstanding the general verdict, was correctly overruled.

The judgment is affirmed, with costs.

No. 9403.

McMAHAN ET AL. v. NEWCOMER ET AL.

PARTITION.—*Pleading.*—*Fee Simple.*—An allegation that petitioners for partition are the owners in fee of the land means that they are the owners in fee simple.

SAME.—*Title.*—In a proceeding for partition, the question of title may be put in issue and determined.

PLEADING.—*Specific Description of Title Controls.*—Where a party specifically describes his title, the specific will control the general averments.

SAME.—*Construction of Will.*—*Exhibit.*—Where a party seeks a construction of a will, he must make it a part of his pleading, by filing it as an exhibit, or otherwise.

WILL.—*Devise to Wife.*—*Life-Estate.*—*Estate Undisposed of.*—*Construction.*—After a devise to the wife of one-third of all the testator's real estate, a definite estate has been "disposed of," and a further devise to her of "all the real estate," "to hold, use and occupy during her lifetime," followed by a devise of "land which remains undisposed of" at the testator's death to his children, gives her a life-estate in the remaining two-thirds.

SAME.—*Heir.*—*Intention.*—It is not necessary, in order to create a fee by devise, that the testator should use the word "heir." A fee will pass, if, taking all the provisions of the will together, it is clear that the testator intended to vest such an estate in the devisee.

SAME.—*Shelley's Case.*—The rule in Shelley's case will not be allowed to defeat the plain intention of the testator.

From the Hamilton Circuit Court.

89	566
125	115
125	170
125	187
126	530
127	498
82	566
143	374
82	565
148	395

McMahan et al. v. Newcomer et al.

D. Moss, R. R. Stephenson and W. S. Christian, for appellants.

F. M. Trissal, for appellees.

ELLIOTT, J.—The petition of the appellees alleges that they are the owners in fee of an undivided interest in lands, and prays a decree of partition.

The petition avers that the appellees are the owners in fee of the land sought to be partitioned, but does not specifically set forth the title. This is sufficient. "In pleading a fee simple, it is only necessary to simply state it, because it includes the entire interest in the land." *McMannus v. Smith*, 53 Ind. 211.

The appellant James G. McMahan filed a cross complaint or counter-claim, in which he asserted title to the entire tract, and controverted the appellees' ownership. The title claimed by the counter-claim is specifically described, and is alleged to have been derived through a devise made by one Jonathan Fox, who died seized of the land. A copy of the will is made part of the pleading as an exhibit.

It is settled by many adjudications, that, in a proceeding for partition under our statute, the question of title may be put in issue and determined. It was proper, therefore, for the appellant to set up his title and ask a judgment quieting it.

The counter-claim contains a general allegation of title, and this the appellant contends makes it good irrespective of the specific statement of the character of the title asserted. This position can not be maintained. Where a party specifically describes his title and states the facts alleged to constitute it, the specific statements will control the general averments. *Reynolds v. Copeland*, 71 Ind. 422; *The State v. Wenzel*, 77 Ind. 428. The sufficiency of the counter-claim must, therefore, be determined upon the facts alleged as vesting title in McMahan.

It is here claimed by the appellant, that the copy of the will is not to be looked to in determining the sufficiency of the pleading, because it is not the foundation of his cause of

McMahan *et al.* v. Newcomer *et al.*

action. It is, perhaps, true that it is not the foundation of the pleading, but it is a written instrument presented to the court for the purpose of obtaining a judicial construction. Where the judgment of a court is sought as to the construction of a will, it is necessary to make it a part of the pleading; and this may be done by filing it as an exhibit. *Copeland v. Copeland*, 10 Ind. 341; *Schori v. Stephens*, 62 Ind. 441.

The provisions of the will, upon which McMahan bases his title, read as follows: "I also further give and devise to my said wife one-third of all the real estate I own at the time of my death. I also give and devise to my said wife, to hold, use and occupy during her lifetime, all the real estate I may own at the time of my death. It is my will that my land which remains undisposed of at my death be divided equally between all my children."

The contention of the appellees is, that the widow of the testator takes a fee in one-third of the land under the clause first quoted, and a life-estate in the remaining two-thirds under the last two clauses. The theory of the appellants is, that she takes only a life-estate in the land with remainder in fee to the testator's children.

We are satisfied that the construction contended for by the appellees, and adopted by the trial court, is the correct one. The first of the clauses quoted vests in the widow a definite estate in one-third of the land, and the second confers upon her a life-estate in all the land owned by the testator. It is true the second clause does not in express terms devise a life-estate, but that is the legal effect of its provisions. The last of the clauses quoted does not destroy the effect of the other two. The author of the will meant, it is plain, to vest in his children two-thirds of the property subject to the right of the widow to possess and use it during life. It is evident that he regarded the devise of one-third of it to his wife as a disposition of that much, and that he meant that the portion devised to her should be treated as disposed of before his death.

 Julien v. Woodsmall.

It is not necessary, in order to create a fee by devise, that the testator should use the word "heir." A fee will pass if, taking all the provisions of the will together, it is clear that the testator intended to vest such an estate in the devisee. 4 Kent Com. 535; *Smith v. Meiser*, 51 Ind. 419. It is settled law that the rule in Shelley's case will not be allowed to defeat the plain intention of a testator. *Doe v. Jackman*, 5 Ind. 283; *Siceloff v. Redman's Adm'r*, 26 Ind. 251; *Helm v. Friebie*, 59 Ind. 526; R. S. 1881, section 2567.

Judgment affirmed.

 No. 9113.

JULIEN v. WOODSMALL.

82	508
134	913
82	508
155	484
82	508
112	397

TRESPASS.—Taking Ice.—Easement.—The right to maintain a mill-dam and exercise the privileges belonging thereto, and to overflow thereby the lands of another, does not confer the right to take ice formed thereon.

SAME.—Railroad.—By acquiring an easement in the lands of another, for the construction of its road across the same, a railroad company takes no right to ice which may form within the boundaries of its right of way. Such ice is the property of the owner of the land, and a stranger taking it is liable as a trespasser.

From the Marion Superior Court.

A. L. Roache and *E. H. Lamme*, for appellant.

D. V. Burns and *C. S. Denny*, for appellee.

BLACK, C.—This action was brought by the appellee against the appellant and another. During the progress of the cause, before trial, the action was dismissed as to said other defendant, and he need not be further mentioned.

The complaint alleged that the appellee was, and for nine years had been, the owner in fee simple, and in possession, of certain land described, in Marion county, Indiana; that running through said land is a stream of water known as Big

Julien v. Woodsmall.

Eagle Creek ; that in the winter of each of said years, said stream, upon said real estate, had produced and yielded a large quantity of valuable ice ; that the appellant, during each of said years, had wrongfully and unlawfully entered upon and taken from said stream and land a large quantity of said ice belonging to appellee, and appropriated the same, and the proceeds thereof, to his own use. It is sought to recover the reasonable value, which is stated, of the ice so taken.

The appellant answered in six paragraphs. The first was the general denial. By the second and third he pleaded the limitations of two years and six years. The fourth paragraph alleged, in substance, that on, etc., one Holmes was the owner in fee simple of all the land on both sides of said stream ; that before said Holmes sold or disposed of the land described in the complaint, or any part thereof, he sold and conveyed to the grantors of the defendant a certain tract of land south of the land in the complaint mentioned, "together with a certain mill-race, water privileges, etc., described in the words, following, to wit: 'Together with the privilege of the right of way for the mill-race already located thereon ; also, the use of the dam and all water privileges belonging to said mill-dam, including the right of taking gravel from the creek below the dam, to keep the same in repair ;'" that the appellee and his grantors took the land in the complaint mentioned subject to all privileges and benefits arising from said dam.

The fifth paragraph alleged that all the ice that grows or is made upon said stream, is so made by reason of a certain dam, built, owned and maintained by the appellant, at his sole expense ; that in the construction of said dam, appellant spent five thousand dollars ; that it is maintained at an annual expenditure of five hundred dollars, and that, without the maintenance of such dam, there would be no marketable ice upon said stream.

The sixth paragraph alleged, that the title in and to the bed of said creek is in the I. & St. L. R. R. Co. and the Central Plank Road Company, and not in the appellee.

Julien v. Woodsmall.

There was a reply in denial to the second and third paragraphs of the answer.

The court sustained a demurrer to each of the fourth, fifth and sixth paragraphs of the answer.

Upon a trial by jury, the verdict was for the appellee. The appellant filed his motion for a new trial, which was overruled, and judgment was rendered upon the verdict. Appellant appealed to the general term, where he assigned as errors the rulings upon the demurrers to the fourth, fifth and sixth paragraphs of the answer, and the overruling of the motion for a new trial.

The judgment at special term was affirmed, and this is here assigned as error.

If, by the fourth paragraph of the answer, it was meant to claim that the rights, privileges and benefits, subject to which it is said the appellee took his land, included the right of the appellant to enter and take ice formed in the waters of the dam where those waters covered land of the appellee, the paragraph wants allegations necessary to the statement of such a claim. It is not stated that the ice alleged in the complaint to have been taken was formed over the land covered by the waters of the dam. No relation is shown between the privileges alleged and the acts charged in the complaint. If the right to enter and take said ice could be so acquired, still, the pleading lacks necessary certainty.

That one, by merely backing the waters of a non-navigable stream, as alleged in the fifth paragraph, may gain a right to enter and take the ice formed in such back-water over the land of another, seems to need no contradiction.

It may be said in connection with these answers, that the appellant's ownership of the "water privileges belonging to such mill-dam," and the rightful maintenance of said dam at his own expense, did not authorize him to enter upon the land of the appellee and take the ice formed over such land in the waters of the dam. *The State v. Pottmeyer*, 33 Ind. 402 (5 Am. R. 224); *Edgerton v. Huff*, 26 Ind. 35 (overruled

Julien v. Woodsmall.

as to the construction of certain statutes in *Water Works Co. v. Burkhardt*, 41 Ind. 364).

The facts alleged in the sixth paragraph of the answer were provable under the general denial, and there was, therefore, no error in sustaining the demurrer to that paragraph. *Milner v. Hyland*, 77 Ind. 458.

The only grounds stated in the motion for a new trial, which have been noticed by counsel for the appellant in argument, are the refusal of the court to give to the jury the first instruction asked by the appellant, and the giving of the court's fourth instruction.

The first instruction asked by the appellant was as follows:

"If the Indianapolis and St. Louis Railroad had acquired the right of way across the creek and lands of the plaintiff by condemnation, by such condemnation the railroad company became absolute owner of such right of way, and the plaintiff can not recover for any ice that may have been taken from such right of way."

The fourth instruction given was as follows:

"Nor is it any justification that a part of the ice removed by the defendant, if you shall find that any was removed by him or by others authorized by him, was taken within the lines of the right of way of the Indianapolis and St. Louis Railway, where it crosses the plaintiff's land. Such ice belonged to the plaintiff, and the defendant had no right to enter within his lines and remove it therefrom."

It appears from the portions of the evidence in the record that the appellee was the owner of the fee within the lines of the right of way mentioned. This, however, would be presumed, as the evidence is not all in the record.

If the appellee had not the right to enter upon the right of way for the purpose of taking the ice, which is a question we need not decide, the railroad company had no authority to take anything found there, except for the construction, repair or operation of its road. *Mills Em. Dom.*, section 210.

It is plain, then, that, even if the appellant were acting under

Board of Commissioners of the County of Montgomery v. Miller.

a license from the railroad company, he could not thereby be authorized to enter and take the ice for his own use, and certainly the right of the railroad company could not protect him, claiming no license, from liability to the owner of the fee for an act which that company could not authorize.

The ice was a part of the appellee's land, and even if it might have been taken by the railroad company for its own use, as claimed by counsel for appellant, it would then be taken under the exercise of the right of eminent domain, and the possession of such a privilege by the railroad company would not authorize the appellant to do the same thing, or excuse him from responsibility to the appellee.

If the appellee had not the right to enter and cut the ice, he would not thereby be deprived of his property in the ice, but only controlled in its disposition, and the severance thereof from his land was a violation of his right. *State v. Pottmeyer*, 33 Ind. 402, 408.

If, in the taking of the ice, the appellant became a trespasser upon the railroad company's right of way, that would not relieve him from liability to the owner of the fee for taking his property found there.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed, at the costs of the appellant.

No. 9574.

BOARD OF COMMISSIONERS OF THE COUNTY OF MONTGOMERY
v. MILLER.

HARMLESS ERROR.—*Pleading.*—*Practice.*—Where a cause has been tried upon agreement to admit all defences without pleading them, the action of the court in striking out a paragraph of answer is not available error.

Board of Commissioners of the County of Montgomery v. Miller.

TRESPASS.—Gravel Roads.—Where a county, in constructing a free gravel road under the act of 1877, Acts 1877, p. 87, without agreement or condemnation, as the act provided, entered upon lands and took gravel, the county was liable as a trespasser.

EMINENT DOMAIN.—Remedy.—Where private property is taken for public use without compensation, and no other remedy is given to the owner, he has the common-law remedy by suit for the injury.

From the Montgomery Circuit Court.

G. D. Hurley and B. Crane, for appellant.

G. W. Paul and J. E. Humphries, for appellee.

FRANKLIN, C.—Appellee filed a claim against appellant for gravel, and for damages for removing the same from her realty, in the sum of \$277.

The board of commissioners allowed her \$60; she appealed to the circuit court, where appellant filed an answer in two paragraphs; the second was struck out on motion, leaving the general denial in. There was a trial by the court; finding for the appellee in the sum of \$159.52, after deducting \$117.48, previously paid for the gravel; and, over a motion for a new trial, judgment was rendered for appellee for the amount found. The case was tried under an agreement, made in open court, that all defences, either legal or equitable, including set-off, might be given in evidence, without pleading the same; that defendant was to have a credit for the sum of \$117.48, and that the amount allowed plaintiff should not be less than that sum.

The errors assigned are:

“1st. The striking out of the second paragraph of the answer.

“2d. Overruling the motion for a new trial.”

The second paragraph of the answer attempted to set up as a defence a former allowance and payment of the said \$117.48, the value of the gravel, to one John M. Miller, the husband of appellee, for the use of appellee.

There was no error in striking out this paragraph; if there had been, it would have been a harmless error, being cured by the agreement to give everything in evidence that could be

Board of Commissioners of the County of Montgomery v. Miller.

legal testimony under any state of pleading. And the agreement allowed appellant the \$117.48, all that it claimed as having been paid. But the allowance of the claim could not bar another claim in favor of another person.

The same ruling is also stated as the third reason for a new trial, and need not be further noticed under that head.

The first reason for a new trial is, that the finding is not sustained by sufficient evidence. The evidence as given clearly tends to support the finding, and there was no error in overruling the motion for that reason.

The fifth reason for a new trial is for error in admitting the testimony of Charles W. White and others, upon the subject of the damages caused by the removal of the gravel.

The gravel was taken in the construction of a free gravel road, being built by the county, under the act of March 3d, 1877, and appellant insists that the county was not liable to pay for the gravel or damages caused by its removal, without a special contract made with the board of commissioners, or under proceedings for condemnation as provided for by the said act. And the reasons stated for the objection are, "that the testimony was irrelevant and incompetent, and was not based upon the legal or proper measure of damages, and that the county was not liable for damages of this kind." There were no objections made to the form of the questions or answers.

The 11th section of the act of March 3d, 1877, Acts 1877, p. 87, provides that the board of commissioners shall have power to contract for, and purchase such stone, gravel or other material as may be necessary for the construction and keeping in repair of such road; and if the commissioners and the owners of such stone, gravel or other material, can not agree on a price deemed fair and reasonable, the commissioners may apply to the judge of the circuit court of the county to appoint appraisers to assess the value of such stone, gravel or other material. It then provides for an appeal from such assessment.

Board of Commissioners of the County of Montgomery v. Miller.

Under this act if the county, through its commissioners, in the construction of a free gravel road, causes its agents and servants to enter upon the lands of any person outside of the right of way for the road, and remove gravel therefrom, without first having contracted for the same, or having it condemned as provided for by the act, it becomes a trespasser and liable for damages done thereby. The act provides for the commissioners to have the appraisers appointed and not for the owners of the land to have it done.

The testimony in the case shows that no contract was made for the gravel or its removal, and no proceedings were had for its condemnation. The only thing said about it was, that appellant's engineer represented to appellee's husband, that the county would pay for the gravel at six cents per cubic yard, according to his estimate.

We think under the facts of the case the county is liable for damages, that the testimony objected to is not irrelevant or incompetent, and there is no error in overruling the objection to its introduction.

But it is insisted that where private property is taken for public use under authority of a law which pointed out the mode in which compensation should be made therefor, that mode and no other should be pursued. And in support thereof we are referred to the following authorities: *Kimble v. White Water Valley Canal Co.*, 1 Ind. 285; *Conwell v. Hagerstown Canal Co.*, 2 Ind. 588; *Null v. White Water Valley Canal Co.*, 4 Ind. 431; *Lafayette, etc., R. R. Co. v. Smith*, 6 Ind. 249; *McCormack v. Terre Haute, etc., R. R. Co.*, 9 Ind. 283; *Indiana, etc., R. W. Co. v. Oakes*, 20 Ind. 9.

True, this court has so held in each of said cases, and in each thereof provision was made by the statute under which the acts were done which were complained of, for the owner of the premises damaged to institute proceedings and recover the damages.

But, in the statute under consideration, no such provision is made; there is no provision for the owner of the premises

Heshion v. Julian *et al.*

to have the damages assessed, and there is no statutory mode prescribed by which he can recover his damages. It certainly can not be established as a rule in such cases, that where the board of commissioners fails to purchase or to make an agreement for the property, or to take any statutory steps to have the damages assessed, the owner of the damaged premises is without any remedy at common law.

We think where the statute has provided no remedy for the injured party, the common-law remedy prevails.

The constitutional provision, requiring compensation to be first made, may be waived, and a common-law remedy enforced. *Graham v. Columbus, etc., R. W. Co.*, 27 Ind. 260; *Graham v. Connersville, etc., R. R. Co.*, 36 Ind. 463 (10 Am. R. 56); *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178; *Anderson, etc., R. R. Co. v. Kernodle*, 54 Ind. 314. The later cases appear to sanction a common-law remedy notwithstanding a statutory one has been provided.

There was no error in overruling the motion for a new trial. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is in all things affirmed, with costs.

No. 9644.

HESHION v. JULIAN ET AL.

PLEADING.—*Debt Due and Unpaid.—Defective Complaint Cured by Verdict.*—

Where the complaint alleges that, on a certain day, the defendant became and was indebted to the plaintiff in a certain sum, which he then promised to pay, but had since failed and wholly refused so to do, and no demurrer is filed to the complaint, and its sufficiency is questioned for the first time by an assignment of error, it will be held that the defects in the complaint were cured by the verdict.

Heshion v. Julian *et al.*

PARTNERSHIP.—*Practice of Law.—Construction of Contract.*—Where it appeared that one L. had entered into a written contract with the law firm of J. & J., wherein they agreed to attend faithfully and skilfully to such legal business as L., by his acquaintance and popularity, and by the use of their names, could get up and turn into their hands, and to charge for such business fair prices, and to collect and divide the fees therefor, one-third to L., and two-thirds to J. & J.

Held, that J. & J. and L. did not, under the contract, become co-partners in the general practice of the law, but only in such legal business as L. might get up and turn over to J. & J.

PLEADING.—*Harmless Error.—Supreme Court.*—Where the trial court has erred in sustaining a demurrer to a paragraph of answer, and it appears that all the matters alleged therein could have been given in evidence under another paragraph on which issue was joined, the Supreme Court will regard the error as harmless, and will not reverse the judgment.

From the Hendricks Circuit Court.

J. V. Hadley, E. G. Hogate and R. B. Blake, for appellant.

J. B. Julian and J. F. Julian, for appellees.

HOWK, J.—This was a suit by the appellees against the appellant, upon an open account for legal services rendered by them for the appellant, as his attorneys. The cause was put at issue and tried by a jury, and a verdict was returned for the appellees, and judgment was rendered accordingly.

In this court, the appellant has assigned the following errors:

1. Appellees' complaint does not state facts sufficient to constitute a cause of action.

2. The circuit court erred in sustaining the appellees' demurrer to the fourth paragraph of the appellant's answer.

In their complaint, the appellees alleged in substance, that on June 1st, 1880, the appellant became and was indebted to the appellees in the sum of \$275, for legal services on and before that date performed for him by them as his attorneys, at his instance and request, as by bill of particulars therewith filed and made part thereof, which said sum the appellant then and there promised to pay, but had ever since failed and wholly refused so to do; wherefore, etc.

Heshion v. Julian et al.

The only point made in argument by the appellant's counsel, against the sufficiency of appellees' complaint, is, that it does not show that the debt in suit was due when this action was commenced. This point would not have been well made, as it seems to us, even if it had been presented by a demurrer to the complaint, before trial and judgment; but even if the complaint were defective, on the ground suggested, the defect is one that might have been cured by the verdict. This suit was commenced on June 17th, 1880, and it was alleged in the complaint, that on and before June 1st, 1880, the appellant "became and was indebted," etc. We think this averment was sufficient to show an indebtedness then due. *Mayes v. Goldsmith*, 58 Ind. 94. The last allegation of the complaint showed with reasonable certainty that the debt in suit remained unpaid. *Higert v. Trustees of Ind. Asb. University*, 53 Ind. 326, and cases cited. The complaint stated facts sufficient to constitute a cause of action.

In the fourth paragraph of his answer, the appellant alleged, in substance, that, at the time the services sued for were rendered, the appellees and one Patrick C. Leary were partners in the practice of the law, having formed a partnership on May 26th, 1879; that the agreement of partnership was in the words and figures following to wit: "It is agreed between Julian and Julian, and Patrick C. Leary, that the said Julian and Julian are to attend professionally to all legal business of the said Leary, in the State of Indiana, and to do it skilfully and well, without any other compensation than as hereinafter stated; said Leary to pay all the cash expenses of travelling, boarding, etc., where it is necessary to go out of Marion county, and in connection with the business; and the said Leary is to get up such legal business as he, by means of his acquaintance and popularity, and by the use of the name of Julian and Julian, can get, and is to turn the same into the hands of Julian and Julian, who are to attend to the same faithfully and skilfully, and charge for the same fair prices, and collect and divide the same as follows, to wit: one-third

Heshion v. Julian et al.

to said Leary and two-thirds to said Julian and Julian ; said Leary is not only to get up such business as he can, but is to render such assistance as he can, in getting up testimony," etc. Signed and dated, May 26th, 1879.

And the appellant averred, that, as such partners, the appellees and said Leary performed the services sued for, and that said Leary, under and by virtue of the foregoing agreement, had a one-third interest in the cause of action, stated in appellees' complaint ; wherefore the appellant said that said Leary was a necessary party plaintiff in this action.

This paragraph of answer was duly verified by the appellant.

We are of the opinion that the court committed no error in sustaining the appellees' demurrer to this fourth paragraph of answer. It is very clear, that the appellees and Leary did not, under or by force of their written agreement set out in said paragraph, become co-partners in the general practice of the law. By its terms, the agreement is expressly limited to the legal business of Leary in this State, and such legal business as he might get up and turn over to the appellees. All such business the appellees agreed that they would faithfully and skilfully attend to, charge fair prices therefor, and collect and divide with Leary the fees therefor in certain specified shares. The agreement did not give Leary any interest or share in the professional business of the appellees, except such as he got up and turned over to them, and, therefore, of itself, the agreement was not sufficient to show that the appellees and Leary were jointly interested in the account sued on in this action, or that Leary had any share or interest therein. In order to show that, under the agreement, Leary had any interest in the appellees' cause of action, the appellant ought to have alleged, in the fourth paragraph of his answer, that the legal services mentioned in the complaint were rendered by the appellees, either in and about the legal business of said Leary, in this State, or in and about legal business got up and turned over by Leary to the appellees. In the absence of

Burchfield v. The State.

such allegations, it seems to us that the fourth paragraph of answer failed to show that Leary had any share or interest in the account in suit, or that he was a necessary party plaintiff in this action. *Macy v. Combs*, 15 Ind. 469; *Emmons v. Newman*, 38 Ind. 372.

Besides, the matters alleged in the fourth paragraph of answer could have been, and no doubt were, given in evidence under the third paragraph of answer, wherein the alleged partnership between the appellees and Leary, among other things, was pleaded in bar of this action. So that, even if the court had erred in sustaining the demurrer to the fourth paragraph of answer, the error would be harmless, and would not be available for the reversal of the judgment below.

The judgment is affirmed, with costs.

82	580
132	147
82	580
154	4
82	580
154	697

No. 9960.

BURCHFIELD v. THE STATE.

CRIMINAL LAW.—Practice.—Continuance.—Absent Witness.—An affidavit for a continuance, on account of the absence of a witness whose whereabouts is unknown, must state such facts as will enable the court to see the probability of the witness being found and his testimony obtained.

SAME.—Murder.—Dying Declarations.—Res Gestæ.—In a prosecution for murder, a declaration of the deceased, unless a part of the *res gestæ*, or made in view of approaching death, is not admissible, and an application for a continuance to obtain testimony in proof of such declaration, should show that it was made under such circumstances as to be competent.

SAME.—Preparation for Trial.—It is not cause for a continuance, in a prosecution for murder, that, for the six weeks since the time of the homicide, the defendant has been in jail, without friends or relatives to hunt up witnesses and make like preparations for the trial, and that her attorneys have been busy in court.

SAME.—Facts Admitted.—Facts admitted to be true, in order to avoid a continuance, can not be disputed on the trial. But an admission in a prose-

 Burchfield v. The State.

cution for murder, that shots were fired from a certain window towards the deceased at the time he was fatally shot, the defendant standing near, does not exclude the testimony of witnesses that they did not hear the shots from the window.

SAME.—Evidence.—Admissions.—Question of Fact.—An admission by the State, in a prosecution for murder, that the deceased, when shot, stood about six feet from and with his right side towards the defendant, and that the ball entered his body near the center of the breastbone, and ranged backward and downward to the *lumbar vertebra*, does not enable the court to say that the defendant could not have fired the shot; and though it was also admitted that other shots were fired towards the deceased from a window which he was facing, it was a question for the jury whether the defendant inflicted the fatal wound.

From the Gibson Circuit Court.

H. A. Yeager and *C. A. Buskirk*, for appellant.

D. P. Baldwin, Attorney General, *A. H. Taylor*, Prosecuting Attorney, *A. P. Twineham* and *J. E. McCullough*, for the State.

WOODS, J.—Under an indictment for murder the appellant was found and adjudged guilty of voluntary manslaughter. She assigns error upon the overruling of her motion for a new trial.

The first reason stated in the motion is the overruling of the motion for a continuance of the cause, which was asked on account of the absence of four witnesses named in the affidavit on which the motion was based. As to two of these witnesses, the affidavit fails to show their residence, or a reasonable probability of obtaining their depositions or attendance at the trial, if postponed. The showing in this respect is, "that this affiant can not now state where said witnesses or either of them (reside); that she has made diligent inquiry and done all in her power to secure their attendance at the present term, but is unable to do so; and affiant can not state whether said witnesses have left the State or not. * * *

That if this cause is continued until the next term of the court affiant can obtain the depositions or personal attendance of said witnesses."

Burchfield v. The State.

It is not enough that the possibility of obtaining the testimony of the absent witness be declared; such facts must be averred as will enable the court to see the probability of the witness being found and his attendance or testimony being procured. To this end the general rule certainly is that the residence of the witness or the place where he may be found must be stated. Moore Crim. Law, sections 284-5.

The matters expected to be proved by the other witnesses were admitted to be true as stated in the affidavit, except the following part, namely: "That they, the said Burton and wife (the witnesses), were the first and only persons to whom said Thomas spoke intelligently, after he was shot as alleged in the indictment; that he, the said Thomas, said to them that some one from one of the windows of the hall (meaning one of the windows in said second story of said building), has shot me."

It is claimed that this part of the statement of what was expected to be proved ought to have been admitted as true. But unless a dying declaration, or made at or so near the time of the shooting as to constitute a part of the *res gestæ*, the declaration was not competent evidence; and as the affidavit fails to state such facts as to show that the proposed evidence was competent, it was not available as a cause for a continuance, and was properly excluded from the admission which the prosecution made in order to prevent a continuance.

Besides the matters referred to, the affidavit shows that the alleged shooting occurred on the 26th day of December, 1880, ever since which time the defendant had been in jail; that the indictment was returned into court on the 20th day of January, 1881; that ever since her imprisonment the defendant had been wholly without friends or relatives to look after and procure the names of witnesses and ascertain competent and material evidence on her behalf in making her defence; that she has engaged counsel who are attorneys of this court and who have been busily engaged in the trial and

Burchfield v. The State.

management of legal business and causes in this court, which has been in continuous session since January 3d, 1881, and in consequence thereof have not had the proper or necessary time to look after and ascertain the names and whereabouts of witnesses whose testimony will be important and material, etc.

On the strength of this showing, it is urged that it was unfair and prejudicial to the appellant's defence to have been forced into trial on the 1st of February, 1881. The showing, however, is plainly insufficient. It does not appear but that, without friends or relatives, and besides her attorneys, busy with other causes, she might have employed other agents just as competent and not too busy with other affairs to do for her the services mentioned. Besides, the affidavits of the attorneys themselves would have been better evidence of their lack of time to prepare for the trial.

We can not say, as we are asked to, that the homicide was accidental and involuntary. There is sufficient evidence to the contrary.

The affidavit for a continuance contains the following statement of matters expected to be proved, which were admitted to be true: "The said shooting was done about ten o'clock at night, and at the time thereof this affiant was standing about six feet from the said Thomas, who was facing said building, with the right side of his body toward this affiant; * * that at the time the said Thomas was shot, * * and for a moment or two prior thereto, there were fired from one of the windows in the second story of said building, * * four or five shots in rapid succession, out into the street, and downward toward the place where said Thomas was standing, * * with his face toward the window from which said shots were fired; * * * that the wound which killed him entered the body of said Thomas near the center of breastbone or sternum, and ranged backward and downward to the lumbar vertebra of the spinal column." Upon this, counsel insist that it was physically im-

Burchfield v. The State.

possible that the appellant could have fired the fatal shot. We think, however, it was a question for the jury; the admission is not so definite and unequivocal as to be absolutely inconsistent with the verdict. "*About six feet,*" "*with his right side towards,*" and "*near the center,*" are expressions so indefinite as to admit of further enquiry on the point, and we have no doubt, upon the evidence, that the jury reached the right conclusion.

Certain witnesses were asked if they heard shots from the window of the building, already mentioned, and answered that they did not. It is insisted that this was error, because it tended to contradict the admission that such shots were fired. If permitted for the purpose of such contradiction, it would doubtless have been error, unless afterwards withdrawn; but it is manifest that for other purposes the question may have been proper, and as the court is shown to have read to the jury the portions of the affidavit which were admitted to be true, and to have distinctly instructed that "the facts embraced in this admission for the purposes of this trial must be taken by the jury as absolutely true," it is not to be believed that the appellant was injured in this respect. Admitting that shots were fired from the window as stated, still, whether they were such shots as could and did produce the wound inflicted on the deceased, was an open question, the solution of which might depend somewhat upon the sound produced, and hence it was competent to enquire of the witnesses whether they heard them. This disposes also of the objection made to the seventh instruction given to the jury, and justifies the action of the court in refusing the instructions asked, in so far as they are not embraced in those given.

We find no error in the record for which the judgment can be reversed.

Judgment affirmed with costs.

Baker v. McCune.

No. 8655.

BAKER v. MCCUNE.

82	585
153	535

JUDICIAL SALE.—*Husband and Wife.—Mortgage.—Ejectment.—Judgment.—*

Redemption.—In ejectment to recover possession of a tract of land, the court found specially that the plaintiff had, under a foreclosure of a mortgage, dated in 1876, for purchase-money, against the defendant alone, obtained a proper sheriff's deed for the land; that when the mortgage was made, the defendant had a wife, still living, who did not join in the mortgage, and, as a conclusion of law, found the plaintiff entitled to possession of the whole of the land, and judgment was so entered.

Held, that the legal effect of the finding and judgment was only to give the plaintiff possession of such interest in the land as the defendant may have had.

Held, also, that the wife had no right to retain possession of an undivided third of the land, and had no right in it save to redeem.

Case adhered to and distinguished—*Kissel v. Eaton*, 64 Ind. 248.

From the Whitley Circuit Court.

J. S. Frazer, W. D. Frazer, J. S. Collins and J. W. Adair,
for appellant.

W. Olds and H. S. Biggs, for appellee.

NIBLACK, J.—Action by John McCune against Joseph Baker to recover the possession of a tract of land in Whitley county. The complaint was in the usual form; the answer in general denial.

From a special finding of facts it was made to appear that on the 7th day of December, 1876, the plaintiff sold and conveyed the land in controversy to the defendant; that for a portion of the purchase-money the plaintiff took the promissory notes of the defendant payable in instalments, secured by a mortgage on the land; that afterwards there was a foreclosure of the mortgage, and a sale of the land by the sheriff to satisfy the amount decreed to be due for the balance of unpaid purchase-money; that the plaintiff became the purchaser of the land at the sheriff's sale, and in due time received a sheriff's deed conveying the same to him; that, at the time of the execution of the mortgage by the defendant,

Baker v. McCune.

and up to and at the time of the trial, one Elizabeth Baker was the wife of the defendant; that the said Elizabeth did not join in the execution of the mortgage, nor was she in any manner a party to the foreclosure proceedings upon it.

Upon these facts the court came to the conclusion that, as against the defendant, the plaintiff was the owner and entitled to the possession of the entire tract of land, and gave judgment in favor of the plaintiff for the whole tract, in accordance with the finding.

The complaint of the appellant here is that the facts, as found by the court, established title in his wife to one undivided third of the land in suit, and that consequently the court erred in coming to the conclusion that the appellee was entitled to recover the entire tract of land.

Counsel for the appellant concede that the judgment appealed from is right as to two-thirds of the land, and also agree that, if all that was said by this court in the case of *Kissel v. Eaton*, 64 Ind. 248, shall be adhered to, the judgment will have to be, in all respects, affirmed. But they contend that the decision in that case was in some, if not all, respects wrong, as applicable to the facts upon which it was based, and hence ought not to be followed in this or any other similar case. Much of the argument on both sides has been addressed to the supposed applicability or inapplicability of the opinion in that case to the facts now before us; but there is one important difference between that case and this, which seems not to have been fully observed, and that is: the wife of the mortgagor was not only a party, but was also the appellant, in that case; whereas in this the wife of the appellant was not a party to the action, and is, consequently, not bound, or in any manner precluded, by the judgment. The plain inference from the facts, as the court found them, was that the appellee was entitled to recover whatever interest the appellant may have had in the land, and, in legal effect, that was all the appellee recovered by his judgment.

As to the claim of title set up on behalf of Mrs. Baker, it

Adams *et al.* v. Lee *et al.*

is only necessary now to say that we adhere to the conclusion reached in the case of *Kissel v. Eaton*, *supra*, and are, hence, of the opinion that the special finding showed no interest in her, as against the appellee, beyond her right to redeem from the sheriff's sale. *Baker v. McCune*, *ante*, p. 339; 1 R. S. 1876, p. 413, section 31.

The judgment will, therefore, have to be affirmed.

The judgment is affirmed, with costs.

No. 8968.

ADAMS ET AL. v. LEE ET AL.

EVIDENCE.—*Transcript.*—*Authentication.*—A transcript of a judicial record of a court of superior jurisdiction of this State, properly authenticated, need not show that the judge signed the proceedings of each day; the authentication is itself evidence of that fact.

JUDGMENT.—*Assignment.*—*Attestation.*—*Set-Off.*—An assignment of a judgment, not attested as the statute requires (R. S. 1881, section 603), is not void; it is, at least, good in equity, and vests such title in the assignee as entitles him to use it as a set-off to a judgment held by the defendant thereto against him.

SAME.—*Lien of Attorney.*—*Evidence of Fees.*—The lien of an attorney for fees, upon a judgment entered as the statute (R. S. 1881, section 5276,) requires, is paramount to the right of the defendant to set off a judgment held by him against the plaintiff; but to hold it against such set-off, proof of the amount due for the fees is necessary.

HARMLESS ERROR.—It is a harmless error to permit a party to duplicate a portion of his record evidence.

From the Johnson Circuit Court.

T. B. Adams, L. T. Michener, G. M. Overstreet, A. B. Hunter and *S. P. Oyler*, for appellants.

O. J. Glesener, E. K. Adams, L. J. Hackney, H. H. Daugherty, T. W. Woollen and *D. D. Banta*, for appellees.

ELLIOTT, J.—On the 27th day of February, 1878, appellees filed a motion to set off judgments of which they had become

82	587
137	540
138	181
139	592

Adams *et al.* v. Lee *et al.*

the owners, against one which Reuben Spicer had obtained against them. On the 13th day of May, 1879, the appellees filed a supplemental motion alleging that the appellants had taken a lien against the judgment rendered in Spicer's favor, and that it was subsequent to the assignment to them of the judgments against Spicer. Appellants appeared and answered the general denial and several affirmative defences, but, as no questions arise on the pleadings, it is not necessary to summarize them.

It is contended that the court erred in admitting in evidence a transcript of one of the judgments described in the motion, for the reason that it does not appear that the proceedings were signed by the judge of the court in which the judgments against Spicer were rendered. It is not necessary that each entry of the rulings made by the court should be signed by the judge. This is expressly decided in *Scott v. Millard*, 10 Ind. 158.

Where a transcript of a judicial record of a court of general jurisdiction, is properly certified by the authorized officer, the presumption is that the proceedings were regular, and that the judge discharged his duty by signing the record at the close of the day's proceedings. This is plainly so upon principle, and is expressly declared to be the law in *Scott v. Millard*, *supra*. There is nothing on the face of the record, nor elsewhere in the evidence, countervailing this presumption.

The cases cited by appellants do not trench upon this doctrine. In *Ringle v. Weston*, 23 Ind. 588, the holding was that a justice must sign the record entry of each case, not the entry of separate rulings, because the statute expressly and imperatively so requires. It is obvious that the rule prevailing in such a case can have no application to courts of superior jurisdiction. The case of *Hougland v. State, ex rel.*, 43 Ind. 537, holding that the entry of replevin bail, which is not attested by the signature of the justice of the peace, is void, has been overruled. *State, ex rel., v. Trout*, 75 Ind. 563; *Stone v. State, ex rel.*, 75 Ind. 235. The case of *Passwater v. Edwards*, 44

Adams et al. v. Lee et al.

Ind. 343, is not at all in point. In that case it was said: "We decide nothing as to the necessity for reading the judgment and signing it before the appellant could be imprisoned upon it. * * * * What we decide is, that where the court had finally adjourned, without any entry of the judgment on the order book, the clerk could not enter it in vacation by the order of the judge, as was done in this case, so as to make it legal and valid." We are not enquiring whether valid process might have been issued without showing that the judge had signed the record. Our enquiry here is, is the proceeding void because the judge's signature does not appear?

We do not think the assignment contained in the record is void because not attested by the signature of the clerk. If it be conceded that there is not a legally attested assignment, still there is an equitable assignment, and this was sufficient to vest such a title in the assignee as entitled him to use it as a set-off against a judgment obtained by defendant against him. *Burson v. Blair*, 12 Ind. 371; *Kelley v. Love*, 35 Ind. 106; *Shirts v. Irons*, 54 Ind 13.

If it were true that the assignment is improperly in the record, it would not be sufficient cause for excluding the entire transcript. The fact, that a transcript contains some matter irregularly there, will not vitiate the whole instrument to such a degree as to require its entire exclusion.

The appellees read in evidence a transcript showing that a judgment was rendered against Spicer on the 1st day of May, 1876, but not setting out any writ, pleading or entry except that of the judgment. We need not enquire whether the transcript was or was not competent, for it clearly appears that it is of the same judgment as that which appears in the transcript of which we have already spoken. It is a copy of the entry of the judgment and is but a part of the complete record which was put in evidence. No harm resulted to the appellants from permitting the appellees to duplicate their evidence. If it was error to permit this it was a harmless one, and for such we can not reverse.

Adams *et al.* v. Lee *et al.*

The remaining question is, were the appellants bound to prove the value of the professional services for which they entered a lien upon the judgment against Spicer? The question is not entirely free from difficulty. In *Dunning v. Galloway*, 47 Ind. 182, it was held that where an attorney sought to set aside a satisfaction of a judgment he must show the value of the fees for which the lien was taken. It was there said that "The complaint fails to allege the amount of the fee due to the plaintiffs either by stating a contract as to the amount, or by averring the value of the services. We can not hold that the amount mentioned in the notice of the lien can be regarded as the true amount, in the absence of any averment on the subject." This goes far to sustain the contention of the appellees. The cases upon mechanics' liens go very far in the same direction. In such cases it is necessary for the claimant to show the amount due him, and the amount stated in the notice of lien is not sufficient to do this. In *City of Crawfordsville v. Irwin*, 46 Ind. 438, it was said of a pleading: "It alleges that the plaintiffs filed a notice of their intention to hold a lien for that amount" (*i. e.* the amount therein stated), "but this is not equivalent to an allegation that that or any other amount was due them from Alexander & Whitset." The analogy between the two classes of cases is a close one; the principle is, in truth, the same. If the one claimant can make out his case by showing the amount stated in his lien, surely so can the other.

The case of an attorney or mechanic asserting a lien is not at all like that of a mortgagee. In the one case the statement is a mere unilateral one; in the other there is a definite amount fixed by contract. Nor is the case of the appellants like that of a plaintiff declaring upon a contract stating consideration. Neither is it like that of a party seeking to enforce a bill of exchange, promissory note or other instrument importing a consideration. On the contrary, it belongs to that class of cases where it is necessary to allege and prove a consideration. The right must rest on a consideration or it

is null, and if none is shown none can be presumed. Such a case as this calls strongly for the application of the general rule just stated. The matter was one peculiarly within appellants' knowledge. They knew better than any one else, whether their compensation was fixed by contract, or if not so fixed what its character and value were. It is an elementary rule, that parties must prove matters peculiarly within their own knowledge. This rule prevails in criminal prosecutions. It is illustrated by those cases which hold that in prosecutions for selling liquor without license the State is excused from proving that the defendant did not have a license, because that is a matter peculiarly within his own knowledge.

The authorities cited to the effect that whatever the court does is presumed to have been rightly done, do not apply here. The entry of the lien is not the act of the court. It is the individual act of the attorney. The statements in the notice of lien are not the statements of the court; they are those of an individual. They have nothing of a judicial character. With quite as much propriety might it be claimed that because an assignment, or a payment of a judgment, is entered upon the record of the court, it is a judicial act, as that the notice of a lien filed by an attorney is such an act.

The case of *Dykers v. Townsend*, 24 N. Y. 57, cited by appellants, is not in point. No such question as is here involved could under the facts of that case have been presented. *Robertson v. Shutt*, 9 Bush, 659, does not aid the appellants, for in that case there was proof of the adjustment of the claim of the attorney, by the client. There was no such evidence in the present case. If there had been a contract fixing the compensation of the appellants, a very different case would have been presented. But they did not offer any evidence to prove either a contract, or that their services were of any value.

This case is not within the rule that a contract, fair on its face, will be upheld, unless there be evidence attacking it. No contract was proved. All there is in evidence is the statement

Adams et al. v. Lee et al.

in the notice of lien. There is absolutely nothing by which to fix value. The question is, therefore, not one of good faith or bad faith. It is simply whether the naked, unsupported, *ex parte* statement in a lien proves value.

Whether the lien relates back to the commencement of the action, is not a material enquiry; for, without some evidence of the value of the lien, it is but an empty thing. The question is not when the appellants acquired a lien, but what did they acquire a lien for? This question can not be answered in their favor unless we accept as sufficient the amount stated in their notice of lien.

We do not doubt that the notice was sufficient to put the appellees on enquiry. It did do this, and they brought the appellants into court, and gave them an opportunity to show the character of their claim. The infirmity is not in the notice; it is in the case made in answer to the challenge to make good the interest claimed through the lien.

If the appellants had shown the value of their services, to that extent their rights would have been paramount to those of the appellees. We have no doubt that the lien of an attorney properly taken is superior to the claim of one owning a judgment against the client. But a lien, like almost everything else, must have value, for without it there is really no foundation. A valueless lien can not defeat a perfect right of set-off.

It is contended that the motion concedes the amount of the lien. It is loosely and badly drawn, but we think it does not make this concession. It challenged the appellants to show the character of their lien, and in their answer the appellants do state the character of their lien, and the foundation upon which it rests—the value of their services; but they offered no evidence in support of their answers.

It is a general rule that allegations of value are not admitted by a failure to controvert them. We think the rule should certainly apply to an informal and summary proceeding like the present.

The Cincinnati, Richmond and Fort Wayne Railroad Company v. Wood.

The concession in the supplemental motion ought not, as it seems to us, to be regarded as going further than that the appellants had filed a notice of a lien. There is neither an express nor an implied admission that the value of their services is the sum named in the notice of lien; the utmost force that can be given the motion is that it concedes that appellants have given notice of a lien for the amount specified in it.

Judgment affirmed.

Petition for a rehearing overruled.

No. 8643.

THE CINCINNATI, RICHMOND AND FORT WAYNE RAILROAD
COMPANY v. WOOD.

RAILROADS.—*Stock Killed by Lessee.*—*Evidence.*—*Variance.*—Complaint against a railroad company to recover the value of a mare of the plaintiff, alleged to have been killed by the defendant, by running its locomotives and cars upon the mare. The evidence disclosed that another railroad company, exclusively operating the road as lessee of the defendant, with its own locomotives and cars, committed the injury.

Held, that the variance was fatal.

SAME.—*Fencing.*—A railroad company is not required by the statute—R. S. 1881, section 4031—to fence its road at places where a fence would interfere with its free use of its property, or with the free use by individuals of their property, or with the rights of the public.

SAME.—*Evidence.*—*Conflict of Witnesses.*—Witnesses, mere casual observers, not engaged in business on a railroad, nor connected with it, nor engaged with those operating it, but pursuing other occupations, testified to a state of facts tending to show that, at a point in question, a fence would not interfere with its free use. Other witnesses, assisting in the business of the road at that point, so that they could not be mistaken, and having peculiar qualifications for knowing and judging of the matter, testified positively to a contrary state of facts, showing that a fence there would be a serious interference with the business of the road, and endanger employees of the road.

VOL. 82.—38

The Cincinnati, Richmond and Fort Wayne Railroad Company v. Wood.

Held, that this was not really a conflict of evidence, but that the class of witnesses first referred to should be understood as testifying only that, so far as they had observed, the facts were as stated by them.

From the Randolph Circuit Court.

A. Zollars, for appellant.

MORRIS, C.—The appellee sued the appellant before a justice of the peace and obtained judgment. The appellant appealed to the circuit court. The cause was submitted to the court for trial. The court found for the appellee, and, over a motion for a new trial, rendered judgment in his favor.

The errors assigned are, that the court erred in overruling the motion for a new trial, and that the complaint does not state facts sufficient to constitute a cause of action.

The complaint is in two paragraphs. The first states that on the 28th day of September, 1876, by its locomotives and cars, then and there used and run on the appellant's railroad track, which runs into the State of Indiana and through the county of Randolph, at a point on its road in said county where the same was not securely fenced, it not being a point on a public highway, but where said railroad might and should have been securely fenced, ran its locomotive and train of cars against and killed a mare of the appellee, of the value of \$150, which mare had entered and passed upon said railroad at a point in said county, where said road was not securely fenced.

The second paragraph charges that the appellant carelessly and negligently ran its locomotive and cars against and killed the appellee's mare when on its road without fault or negligence on the part of the appellee.

The testimony in the case showed that a highway, running east and west on the section line, crossed the appellant's road, which runs nearly north and south, about 800 feet north of its depot, at Ridgeville in said county; that another highway, called the county road, crossed the appellant's road about 2157 feet north of said depot. On the west side of the main

The Cincinnati, Richmond and Fort Wayne Railroad Company v. Wood.

track, there was a side track some nine feet west of the main track, extending 1555 feet north of the depot and 117 feet south of it. The switch stand is at the north end of the switch. From the switch stand to the crossing of the county road is 602 feet. On the west side of the track the appellant owns and occupies a strip of land, averaging in width some 75 feet, and extending from the county road to its depot. On this strip of land and about 900 feet south of the county road, the appellant built its stock pens, 132 feet in length and 42 feet in width. That portion of the strip of land on the west side of the road, lying between the stock pens and the depot, is used for loading and unloading freights. That portion of said strip lying between the stock pens and the county road crossing is used for logs, sawdust and by persons coming and going with teams in the transaction of business on said railroad.

Immediately south of the appellant's depot, its road is crossed by a public street. Some 600 feet south of the appellant's depot, its road is crossed by the Pan-Handle Railroad; on the east side of the appellant's road, and nearly opposite its depot, there is a mill and other buildings, owned by other parties; the owner of the mill has and owns a side track, extending north some distance from the mill, and connecting with appellant's track; on the east side of the railroad, the appellee owns a field, the fence on the west side of which extends from a point about 200 feet south of the crossing of the appellant's road by the county road, southward to the section line road; from the north end of appellee's field to the county road crossing—200 feet—the appellant's road is not fenced. The appellee's mare was in the field east of the railroad; she got out of the field and on to the appellant's road the day she was killed. So far, there is no conflict in the testimony.

The appellee contends that his mare got out of his field, passed upon the railroad north of the field and south of the county road, where the railroad was not fenced, and that she went south upon the appellant's right of way, and got upon

The Cincinnati, Richmond and Fort Wayne Railroad Company v. Wood.

the track just north of the switch stand, and was there struck by the appellant's locomotive and killed, and carried by the cow-catcher some thirty feet south of the switch stand. The appellant insists that the fence on the west side of the appellee's field was out of repair; that the mare got out of the field opposite the switch stand, and came upon the road south of it and was there killed. Upon these points the testimony is conflicting. It was for the jury to determine these questions, and as the testimony in relation to them is conflicting, their decision can not be disturbed on the ground that, as to them, it is not sustained by the evidence.

The appellant further contends that it was not its duty to fence any part of its road between the point where it is crossed by the county road and its depot; that to fence that portion of its road would seriously interfere with the transaction of its business. The appellee has not filed a brief. We do not know what his views upon this question may be.

The testimony upon this question is not, seemingly, in complete harmony, though we think it can hardly be said to be conflicting.

Some of the witnesses on the part of the appellee testified that no business was transacted by the appellant on its road north of the switch stand to the county road crossing—a distance of 602 feet—except to run its locomotives and trains over its main track; that cars were neither loaded nor unloaded north of the switch stand; that the right of way was not used north of the switch stand, by those doing business on the road for any purpose, and that there was, therefore, no reason why the road should not have been securely fenced where the mare got upon it. But the witnesses thus testifying for the appellee were not in any way engaged in business on the road or connected with it or with those managing its business. They were engaged in other occupations, and were, at most, but casual observers of the road, its use and the business transacted upon it. They should, we think, be understood as testifying that, so far as they had observed or noticed,

The Cincinnati, Richmond and Fort Wayne Railroad Company v. Wood.

the ground north of the switch stand or stock pens, had not been used by those in control of the railroad. So understood, their testimony is not in conflict with the testimony introduced by the appellant.

A number of witnesses connected with the road, and managing its business, loading and unloading freight, making up trains, coupling and uncoupling cars, with ample opportunities and peculiarly qualified to judge as to the extent of side tracks, and the quantity of ground required for the convenient transaction of the business of the road, testified that, in their judgments, the road between the county road crossing and the depot could not be fenced without seriously interfering with the transaction of its business. They testified that the ground belonging to the company north of the switch stand, on the west side of road, was used by persons doing business on the road; that sawdust was deposited on this ground, and from it loaded on the cars; that teams, in carrying freight to and from the road, used it. They also testified that the company had not sufficient side tracks at Ridgeville; side tracks could not be constructed south of the depot. They also testified that, for the want of sufficient side tracks, the company had to use the Y connecting their road with the Pan Handle road, and the private track leading to the mill; that, for the same reason, they are sometimes obliged to leave cars six miles distant from Ridgeville; that it often happened that when the side track was full of cars, they had to couple and uncouple cars on the main track north of the switch stand; that at such times the employees, operating the train, got off of it at the county road crossing; that if cattle guards were placed there, as they would have to be to prevent animals from getting on the track, it would not only interfere with the coupling and uncoupling of cars, but greatly increase the attending danger.

We think that it would be unreasonable to require the appellant to fence its road between the crossing of the county road and its depot; that it could not, upon the testimony in

The Cincinnati, Richmond and Fort Wayne Railroad Company v. Wood.

the case, be required to do so, without unjustly interfering with the proper and legitimate use of its property. This case, in its facts, seems to fall within the decision of the case of *Ohio, etc., R. W. Co. v. Rowland*, 50 Ind. 349. In that case it was held that the following instruction should have been given :

“ Neither does the law require a railway company to build and maintain a fence at a point where by so doing it will interfere with the free use of a switch or side track constituting a part of the road ; nor is such company bound to build or maintain a fence at a point on its road where it will interfere with the free use of a piece or parcel of ground kept and used by the company as a coal or wood yard, nor when it will interfere with the free use of a yard or lot kept for the purpose of loading or unloading staves, lumber, timber, wood, or other kinds of freight shipped or to be shipped on the cars of the company. And when there is a mill or hay press on or near a railroad track, if the maintaining of the fence at or near the mill or press would interfere with the free use of the same, then the company is not required to build or maintain the fence so as to interfere with the free use of the mill or press. And if there is a lot or yard used in connection with the mill or press, the company is not bound to build or maintain a fence at any point where the same will interfere with the free use of such lot or yard. But whenever a company can build and maintain a fence without interfering with the rights of the public, or with the free use of property belonging to private individuals, or of its own property, then it is bound to maintain a fence, whether it be in a town or village or in the country.”

In the case of *Indianapolis, etc., R. R. Co. v. Christy*, 43 Ind. 143, it was held that railroad companies were not required to fence their tracks at stations and sidings where freight or passengers are received or discharged, and that they were not liable to pay for cattle that might wander upon the track at such places, if killed by the company without negli-

The Cincinnati, Richmond and Fort Wayne Railroad Company v. Wood.

gence on its part. *Indianapolis, etc., R. R. Co. v. Oestel*, 20 Ind. 231; *Jeffersonville, etc., R. R. Co. v. Beatty*, 36 Ind. 15; *Wabash, etc., R. W. Co. v. Forshee*, 77 Ind. 158; *Indianapolis, etc., R. W. Co. v. Crandall*, 58 Ind. 365.

But the first paragraph of the complaint charges that the appellant, the Cincinnati, Richmond and Fort Wayne R. R. Co., ran its locomotive and cars against and killed the plaintiff's mare. It is not averred that the Grand Rapids and Indiana R. R. Co. was running the appellant's road under a lease from it or otherwise. No cause of action is, therefore, stated against the Grand Rapids and Indiana R. R. Co. It is not mentined in the complaint. *Cincinnati, etc., R. R. Co. v. Paskins*, 36 Ind. 380. The proof shows that the locomotive and cars of the Grand Rapids and Indiana R. R. Co. were, by its agents, run against the appellee's mare, causing her death. This was all the testimony there was upon the point. Can it be said that evidence which showed that the mare was killed by a locomotive and cars belonging to the Grand Rapids and Indiana R. R. Co., run and owned by it, tended in any degree to prove the averment in the complaint that the mare was killed by the locomotive and cars of the appellant, run by it? We think the evidence had no tendency to prove the allegation. *Cincinnati, etc., R. R. Co. v. Paskins, supra*.

It may be that the appellant would be liable for the acts of the G. R. & I. R. R. Co., but to render it liable, the facts which create the liability should be stated and proved. So, too, it may be that the G. R. & I. R. R. Co. could be made liable in the name of the appellant for killing the appellee's mare, but the facts upon which the liability rests must be stated and proved before a recovery can be obtained. We think the proof did not sustain the finding of the court, if based upon the first paragraph of the complaint.

Nor was the appellee entitled to recover upon the second paragraph of the complaint. The evidence of the appellee showed that the appellant had leased its road to the Grand

Keiser v. The State.

Rapids and Indiana R. R. Co. in 1871, for the term of ninety-nine years. The uncontroverted testimony in the case shows that the latter company was, at the time the mare was killed, in possession of the road, running and operating the same. The mare was killed by the locomotive and cars of the G. R. & I. R. R. Co., run and operated by its employees. Upon the evidence, it is very clear that the mare was not killed as charged by the appellee. It is equally clear that the appellant was not liable on the second paragraph of the complaint, for the acts of the G. R. & I. R. R. Co. The evidence did not tend, in the slightest degree, to sustain a finding against the appellant on the second paragraph of the complaint. *Cincinnati, etc., R. R. Co. v. Bartlett*, 58 Ind. 572. The motion for a new trial should have been sustained.

PER CURIAM.—The judgment below is reversed, upon the foregoing opinion, at the costs of the appellee.

No. 10,429.

KEISER v. THE STATE.

From the Henry Circuit Court.

D. W. Chambers and *J. S. Hedges*, for appellant.

D. P. Baldwin, Attorney General, and *L. P. Newby*, Prosecuting Attorney, for the State.

WORDEN, J.—This was a prosecution against Keiser for selling intoxicating liquor to one Charles Lowe by a less quantity than a quart at a time, without a license.

The case is quite similar to that of the same appellant against the State, *Keiser v. State*, *ante*, p. 379, and the charge was similar to the one given in that case. For the reason given in that case the judgment herein must be reversed.

The judgment below is reversed, and the cause remanded for a new trial.

Ritter v. Wilson.

No. 8406.

SHINDLER v. THE WAYNE AND UNION STRAIGHT LINE
TURNPIKE COMPANY.

From the Wayne Circuit Court.

I. B. Morris and H. U. Johnson, for appellant.

W. A. Bickle, for appellee.

ELLIOTT, J.—This case is in all material respects like that of *Smelser v. Wayne, etc., T. P. Co.*, ante, p. 417; and, on the authority of that case, the judgment must be reversed.

No. 7590.

MORRISON ET AL. v. FOUST ET AL.

From the Huntington Circuit Court.

W. H. Trammel, for appellants.

J. B. Kenner, for appellees.

NEWCOMB, C.—This case presents the same questions that are decided in *Coolman v. Fleming*, ante, p. 117; and, on the authority of that case, the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and it is hereby in all things reversed, at the costs of the appellees, and that the cause be remanded to said circuit court, with instructions to overrule the motion to dismiss said cause, and for further proceedings.

No. 9350.

RITTER v. WILSON.

From the Kosciusko Circuit Court.

J. S. Fraser and W. D. Fraser, for appellant.

W. S. Marshall and H. D. Wilson, for appellee.

ELLIOTT, J.—It is insisted by the appellee that the evidence is not in the record, for the reason that the bill of exceptions does not contain the statement that "this was all the evidence given in the cause," or equivalent words. The contention of appellee must prevail.

It is necessary to a proper understanding and decision of the questions involved, that the entire evidence should be examined, *Louisville, etc., R. W. Co. v. Murdock*, ante, p. 381; and, as it is not in the record, the result is, that the judgment must be affirmed.

Bennett *et al.* v. Crim.

No. 8152.

BAIRD v. GLICK.

From the Tippecanoe Circuit Court.

J. A. Stein and *J. F. McHugh*, for appellant.

J. R. Carnahan and — *Collins*, for appellee.

WOODS, J.—The appellant complains of an instruction, but, except a recital in the motion for a new trial, there is no evidence in the record that the instruction was given. *Adams v. Stringer*, 78 Ind. 175.

The principal question of fact in the case was whether or not a sale of a stock of goods was made for the purpose of defrauding creditors; and the jury having found that it was not fraudulent, we are asked to set the finding aside. If a case be conceivable, wherein we would be justified, under the rule which governs our action upon questions of fact, in setting such a verdict aside, this is not such a case.

Judgment affirmed, with costs.

No. 10,186.

SCHWARM v. THE STATE.

From the Tippecanoe Circuit Court.

A. Parsons, for appellant.

D. P. Baldwin, Attorney General, for the State.

ELLIOTT, J.—This case is affirmed upon the authority of *Schwarm v. State*, *ante*, p. 470.

No. 8773.

BENNETT ET AL. v. CRIM.

From the Madison Circuit Court.

W. R. Pierce and *C. B. Gerard*, for appellants.

M. A. Chipman and — *West*, for appellee.

WOODS, J.—The errors assigned and the questions discussed in this case can not be decided without a reference to the evidence; but the bill of exceptions does not profess to contain all the evidence given in the cause. There is, therefore, no question before us. *Louisville, etc., R. W. Co. v. Murdock*, *ante*, p. 381.

Judgment affirmed, with costs.

INDEX.

ABATEMENT.

See JUDGMENT, 1.

ACCOUNT.

See STATUTE OF LIMITATIONS, 2; SUPREME COURT, 16.

ACTION TO QUIET TITLE.

See MARRIED WOMAN, 1.

1. *Injunction.—New Trial.—Evidence.*—In an action to quiet title and to obtain an injunction to restrain the defendant from injuring the property, the defendant is not entitled to a new trial merely because there was no evidence of the threatened injury. *Stockton v. Lockwood, 158*
2. *Same.—Complaint.—Practice.*—Where the complaint states facts which entitle the plaintiff to a judgment quieting his title, the suit may be regarded as an action to quiet title, and if the complaint is answered, such relief may be granted, though the complaint contains no such prayer. *Ib.*
3. *Answer.—Tax Title.*—In an action to quiet title, an answer that the defendant has purchased the property for taxes duly assessed upon it, and claims no other interest, is sufficient on demurrer. *Porter v. Mitchell, 214*
4. *Same.—Reply.—General Denial.—Issues.*—In such action, an answer that the defendant owns a part of the land in fee, and disclaims any interest in the residue, and denies that he ever claimed it, is sufficient as an answer in denial; such answer closed the issues, and there was, therefore, no error in sustaining a demurrer to special paragraphs of a reply to such answer. *Ib.*
5. *Same.—Counter-Claim.—Practice.*—The fact that such answer contained a prayer for affirmative relief does not render it a counter-claim; but, if regarded as a counter-claim, the reply must be regarded as an answer, and as the general denial was filed, under which all defences were admissible, there was no error in sustaining a demurrer to a special paragraph of reply to the answer. *Ib.*
6. *Pleading.—Averments as to Claim of Defendant.*—It is not necessary that the complaint, in an action to quiet title, should show with particularity the nature of the defendant's claim; and where the complaint, in such an action by the owner of real estate sold on execution, avers that the defendant refused to recognize the redemption of the land by the plaintiff, made prior to the expiration of the year allowed for redemption, but thereafter demanded and received a deed from the sheriff, such averments sufficiently show a claim by the defendant, under color of title, adverse to the plaintiff, from which the owner is entitled to have the property freed. *Boyd v. Olvey, 294*

INDEX.

ADMINISTRATOR.

See DECEDENTS' ESTATES; REAL ESTATE, ACTION TO RECOVER, 2.

ADMISSIONS.

See CRIMINAL LAW, 26, 27.

ADVANCEMENT.

See PROMISSORY NOTE, 6.

ADVERSE POSSESSION.

See VENDOR AND PURCHASER, 2 to 4.

AFFIDAVIT.

See MANDAMUS, 1.

AFFIDAVIT AND INFORMATION.

See CONTEMPTS, 2 to 6; CRIMINAL LAW, 10, 21, 22.

AGENCY.

See CRIMINAL LAW, 11; NEGLIGENCE, 5; PROMISSORY NOTE, 12.

AGREEMENT.

See CONTRACT; FRAUDULENT CONVEYANCE, 1; MARRIED WOMAN, 2 to 4, 7; SHERIFF'S SALE, 1, 3, 11; TRUST AND TRUSTEE.

ALTERATION.

See PROMISSORY NOTE, 2, 5; REVIEW OF JUDGMENT, 2.

AMENDMENT.

See CONTEMPTS, 5; CRIMINAL LAW, 21; DRAINAGE, 2; PRACTICE, 14, 20; SUPREME COURT, 7.

ANIMAL.

See NEGLIGENCE, 2.

APPEAL.

See BILL OF EXCEPTIONS, 2; CITY, 1, 2; CONTEMPTS; CRIMINAL LAW, 4; RECEIVER; SUPREME COURT, 2.

APPEARANCE.

See JUDGMENT, 3.

APPURTENANCES.

See MILL.

ARREST OF JUDGMENT.

See CRIMINAL LAW, 7; PRACTICE, 19.

ASSAULT AND BATTERY.

See CRIMINAL LAW, 19.

ASSESSMENT LIST.

See EVIDENCE, 1.

ASSESSOR.

See EVIDENCE, 1.

ASSIGNMENT.

See JUDGMENT, 7; MARRIED WOMAN, 4; MORTGAGE, 4; PROMISSORY NOTE, 4, 8, 9, 10, 11, 12, 14; SHERIFF'S SALE, 11, 12; VOLUNTARY ASSIGNMENT; WILL, 1.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See SHERIFF'S BOND; VOLUNTARY ASSIGNMENT.

ASSIGNMENT OF ERROR.

See PRACTICE, 24; SUPREME COURT, 20, 21.

1. *Supreme Court*.—An assignment of error must specify why the court ought not to have rendered the judgment complained of. To say "it ought not to have done it," presents no question.
Dawnhauer v. Hilton, 531
2. *Same*.—*New Trial*.—*Deposition*.—Causes for a new trial are not proper specifications of error, and, therefore, the overruling of a motion to suppress a deposition can not be brought to the consideration of the Supreme Court by an assignment thereof as error. *Ib.*

ASSUMPSIT.

See DRAINAGE, 8; FRAUDULENT CONVEYANCE, 2.

ATTACHMENT.

See FRAUDULENT CONVEYANCE, 4.

ATTESTATION.

See JUDGMENT, 7.

ATTORNEY.

See JUDGMENT, 8; PARTNERSHIP; PRACTICE, 15, 16; PROMISSORY NOTE, 8.

BANK.

See PROMISSORY NOTE, 9, 10; REDEMPTION.

BANKRUPTCY.

Bankrupt's Property.—*Title Reveals on Discharge Without Proof of Claims*.—*Judgment of Discharge can not be Collaterally Attacked*.—Where a person has been adjudged a bankrupt and his property conveyed to an assignee, and no claims are proved against the bankrupt, and both bankrupt and the assignee are legally discharged, the property in the hands of the assignee reverts in the bankrupt without any formal conveyance. Such judgment of discharge can not be collaterally impeached, even as to the fact that the bankrupt was not entitled to a discharge.
Boyd v. Olvey, 294

BASTARDY.

See DESCENTS; EVIDENCE, 3.

1. *Evidence*.—Where, in a prosecution for bastardy, the relatrix introduces evidence tending to prove efforts on the part of the defendant, after knowledge of her pregnancy, to induce the marriage of the relatrix to another man, the defendant may prove that he, in fact, discouraged such marriage. *State, ex rel., v. Bottorff, 538*
2. *Limitation of Action*.—*Infant*.—A prosecution for bastardy must be commenced within two years from the birth of the child, notwithstanding the relatrix is an infant. *State, ex rel., v. Purdy, 543*

BILL OF EXCEPTIONS.

See JUDGMENT, 5; MASTER COMMISSIONER; PRACTICE, 1, 7, 18, 21; SUPREME COURT, 5, 13.

1. *Practice*.—*Record*.—A bill of exceptions, otherwise regular on its face, which concludes with the words "to be agreed to by counsel," the signature of the judge then following, with no explanatory proof, will be regarded as properly in the record. *Stephenson v. Ballard, 87*
2. *Appeal*.—*Question Reserved*.—*Evidence*.—*Presumption*.—When an appeal is taken according to section 630, R. S. 1881, upon a bill of exceptions only, and the question reserved is upon the exclusion of the defendant's evidence, the bill of exceptions should show enough of the case

to develop the relevancy of the evidence rejected; else it will be presumed that it was not relevant. *Downs v. Opp*, 166

3. *Statement of Testimony.—Witness.*—It is not proper to state in a bill of exceptions, made for the purpose of showing the evidence, what was proven by a witness. His testimony should be given as delivered, as nearly as practicable. *Hays v. City of Vincennes*, 178

4. *Motion for New Trial.*—Affidavits in support of a motion for a new trial were contained in the motion, but the bill of exceptions did not contain them, and had only this concerning them: "And filed in support of said motion the following affidavits (which have been inserted on page — of this record)."

Held, that the affidavits were not properly in the record.

5. *Master Commissioner's Report.*—Where a cause is referred to a master commissioner to "hear and report the evidence and his finding of facts therein to the court," the report is no part of the record, unless made so by a bill of exceptions or an order of the court. *Chambers v. Butcher*, 508

Stanton v. State, ex rel., 463

BILL OF PARTICULARS.

See PLEADING, 10.

BOARD OF COUNTY COMMISSIONERS.

See CONTRACT, 7, 8; COUNTY COMMISSIONERS; DRAINAGE, 2 to 5.

BONA FIDES.

See PROMISSORY NOTE, 9, 10, 14.

BOND.

See COUNTY COMMISSIONERS; DECEDENTS' ESTATES, 4; GUARDIAN'S BOND; MARRIED WOMAN, 8; PRACTICE, 7; SHERIFF'S BOND; SHERIFF'S SALE, 8, 10.

BRIDGE.

See MECHANIC'S LIEN, 5.

BRIEF.

See SUPREME COURT, 9.

BURDEN OF PROOF.

See LIQUOR LAW, 2; PRACTICE, 6; PRINCIPAL AND SURETY, 2; PROMISSORY NOTE, 14; SOLDIER'S BOUNTY; SPECIAL FINDING, 1; SUPREME COURT, 8; TENANT FOR LIFE.

CASES CRITICISED.

Scranton v. Stewart, 52 Ind. 68, and *Miles v. Lingerian*, 24 Ind. 385, criticised as to disaffirmance of a deed by an infant *feme covert*.

Stringer v. Northwestern, etc., Co., 100

CAVEAT EMPTOR.

See JUDICIAL SALE, 2.

CHANGE OF VENUE.

Jurisdiction.—Record.—Presumption.—Practice.—When a change of venue has been taken from the judge, and another judge appointed takes jurisdiction of the cause, under whose order it is continued, and on the twelfth day of the next term, and before the regular judge, the party who obtained the change is permitted, over objection, to withdraw his application therefor, and the cause is subsequently tried before the regular judge, the record being silent as to the presence of the judge appointed, it will be presumed that he had abandoned the cause, and there is no error. *Hervey v. Purry*, 263

CHATTEL MORTGAGE.

See REPLEVIN, 8.

CITY.

See LIQUOR LAW, 3.

1. *Opening Streets.—Appeal.—Statute Construed.*—The act of March 17th, 1875, 1 R. S. 1876, p. 318, in relation to laying out streets, etc., is amendatory and supplemental to chapter 12 of the general law concerning cities, of March 14th, 1867, 1 R. S. 1876, p. 267, and proceedings on appeal from the opening of streets are regulated by the former act. *Hays v. City of Vincennes, 178*
2. *Same.—Record of Proceedings.—Demurrer.—Pleading.*—In a proceeding, under the act of March 17th, 1875, 1 R. S. 1876, p. 318, for widening a street, a demurrer to the transcript for want of sufficient facts is not permissible on appeal, but the specific grounds of objection, if apparent on the face of the record, must be stated in the demurrer, and matters of fact not so apparent must be pleaded. *Ib.*
3. *Same.—Description of Street.*—It is not necessary that the resolution of the common council of a city for the widening of an existing street describe the street by course and distance, or state "of what it consists" or "from whom or whence taken." It is enough if the location and extent of the proposed change be well stated. *Ib.*
4. *Same.—Report of Commissioners.—Description of Property.—Names of Owners.*—In such proceeding, the report of the city commissioners must be certain and definite in respect to the names of owners and value and description of property taken as well as of that upon which damages or benefits have been assessed. "The remainder" of a lot, from which a specified part has been taken, is a good description. *Ib.*
5. *Same.—Order of Appropriation.*—An order of the common council for the appropriation of a strip thirty-one feet wide, from the south side of a lot next to the street to be widened, "so as to make the said street fifty feet in width," is not indefinite. *Ib.*
6. *Cities and Towns.—Additions.—Reservations.—Marks on Plats.*—Where a plat into lots is made of an addition to an incorporated town or city, and reservations for any purpose are marked on such plat, the intention of the proprietor of such plat in regard to the meaning of the marks on such reservations is in general a question of fact, and not of law. *Pidgeon v. McCarthy, 321*
7. *Same.—Borough of Vincennes.—General Harrison's Reserve.*—Where it appears that General William Henry Harrison, in 1816, made a plat of an addition to the borough of Vincennes, and marked on the plat of such addition one of the lots therein with the words "*General Harrison's Reserve*," and where it also appears that such lot, so marked, was thereafter assessed for taxation for municipal purposes by the borough, town and city of Vincennes, in their successive corporate capacities, and where it further appears that for nearly sixty years such municipal taxes so assessed on such lot had been paid to the proper officer of the existing corporation by the successive owners of such lot, *Hdd*, that, from these facts and others of like import, the trial court properly stated, as its conclusion of law, that the lot in question was and is within the corporate limits of the city of Vincennes, and subject to taxation by the city authorities for municipal purposes, as other real estate within the city limits. *Ib.*

CLERK OF THE CIRCUIT COURT.

See REDEMPTION.

COLLATERAL ATTACK.

See BANKRUPTCY; DRAINAGE, 1; JUDGMENT, 4.

COLLATERAL SECURITY.

See PROMISSORY NOTE, 9.

COLLEGE SECRET SOCIETY.

See SCHOOL LAW.

COMMISSION MERCHANT.

See SUPREME COURT, 15.

COMMON LAW.

See EMINENT DOMAIN.

CONSIDERATION.

See CONTRACT, 1 to 3; MARRIED WOMAN, 7; MORTGAGE, 3; PLEADING, 10, 11; PROMISSORY NOTE, 3, 6, 9, 12; TORTS.

CONSTITUTIONAL LAW.

See JUDICIAL SALE, 3.

CONSTRUCTION OF STATUTES.

See REPEAL OF LAWS.

CONTEMPTS.

1. *Courts.—Appeal.—Statute Construed.*—Under the act of March 31st, 1879, in relation to contempts of courts, R. S. 1881, sections 1005 to 1013, there may be an appeal to the Supreme Court in cases of indirect contempt, though the punishment adjudged be only a fine in a sum less than twenty-five dollars. *Worland v. State, 49*
2. *Same.—Affidavit.—Information.—Practice.*—In a prosecution for an indirect contempt under such act, an information by the prosecuting attorney is not required. An affidavit or duly verified information of an officer of the court or other responsible person is sufficient, but the filing, in addition, of an information by the prosecutor will not vitiate the proceedings. *Ib.*
3. *Same.—Rule.*—The rule against the defendant in proceedings for contempt, should set forth the facts shown in the affidavit or information, but will not be bad for reciting the facts "as alleged in the affidavit," which is the foundation upon which the rule must stand. *Ib.*
4. *Same.—Waiver of Rule.*—The defendant in a prosecution for contempt may waive the issuing of a rule against him, and make his answer to the information or affidavit. *Ib.*
5. *Same.—Amendment.*—If in proceedings for contempt the rule be quashed, the information being good, an amended rule may be issued. *Ib.*
6. *Same.—Newspaper Publication.*—An information for contempt on account of a newspaper article, which charges that the publication was "false and grossly inaccurate," is insufficient, if it does not specify in what respects the article is false. *Ib.*

CONTINUANCE.

See CRIMINAL LAW, 23 to 26.

1. *Witness.—Diligence.—Practice.*—Where an affidavit for a continuance, on account of an absent witness, shows that the applicant knew that the attendance of the witness could not be secured, but took no steps to secure his deposition, the application should be refused, for failure to show due diligence. *Louisville, etc., R. W. Co. v. Kious, 357*

2. *Same.—Deposition of Witness.*—Where a party can obtain the deposition of a witness whose personal attendance he knows can not be secured at the term of court at which the cause is set for trial, it is his duty to cause his deposition to be taken. *Ib.*
3. *Absent Witness.—Diligence.*—Where a cause has been long pending and once continued, an affidavit for a continuance for an absent witness, whose residence has all the time been unknown to the party, and which, as to diligence, alleges only that "since the cause has been pending he has been making diligent enquiry as to the whereabouts of the witness," and that he has, only a few days before, learned that the witness resides in Kansas, but not the place of his residence, is insufficient, because of its failure to state specifically the facts showing diligence of enquiry. *Chambers v. Butcher, 508*

CONTRACT.

See CORPORATIONS, 4; FRAUDULENT CONVEYANCE, 1, 4; JUDICIAL SALE, 3; MARRIED WOMAN, 1 to 4, 7; MECHANIC'S LIEN, 2, 3; NEGLIGENCE, 3; PARTNERSHIP; PLEADING, 10, 11; SHERIFF'S SALE, 1, 2, 3, 11; TORTS; TRUSTS AND TRUSTEE; VENDOR AND PURCHASER, 1, 5; WITNESS.

1. *Consideration.—Merger.—Release of Surety in Judgment.*—R. recovered a judgment on a note against B. and M., the latter being surety. Therefore, B. had made his note to S. for \$2,500, and to secure that and to indemnify M. had executed a mortgage to S. and M. upon 300 acres of land. Afterwards, in pursuance of an agreement between all of said parties, B. paid R. \$1,000 on the judgment, and conveyed forty acres of the land to S., in satisfaction of his demand, and M., for the purpose of releasing the forty acres from the lien of the mortgage, assigned the same to S., R. at the same time agreeing to release M. from the judgment.

Held, in an action by M. to enjoin the levy and sale of his property under the judgment, that the agreement was upon a sufficient consideration and binding on R. and his executor, and was not merged in a subsequent written release, made without M.'s knowledge, by R. to B.

Bilsland v. McMunomy, 139

2. *Promise to Pay Debt of Third Person.*—A written promise, on a new and valuable consideration, to pay the debt of a third person, is valid, although there is no release of the original debtor, and may be enforced by the creditor. *Seeance v. Gall, 255*
3. *Same.—Consideration.*—The assignment of a sheriff's certificate of the sale of land under a decree of foreclosure is a sufficient consideration for a promise by the assignee to pay a junior judgment lien on the land. *Ib.*
4. *Same.—Performance in Manner Requested.*—A party procuring performance in a given manner can not complain thereof. *Ib.*
5. *Same.—Payment in Notes.—Action for Recovery of Money.*—Where one undertakes to pay in notes and refuses to execute them, he may be sued in the first instance for the recovery of money. *Ib.*
6. *Estimating Extra Work.—Evidence.*—Where, by the terms of a building contract, extra work is to be estimated in proportion to the contract price of the entire work, evidence of the reasonable value of the extra work is not admissible. *Eigemann v. Board, etc., 413*
7. *Same.—County Commissioners.—Individual Action.—County Building.*—The authority of a board of county commissioners, for the doing of extra work in the construction of a county jail, under a contract with plans and specifications, can not be shown by proving the separate individual assent of the members of the board. *Ib.*

8. *Same.—Ratification.—Mistake.*—It is not competent to show a ratification by the board of commissioners of extra work done under a contract for the building of a jail, by proof that the disputed items were omitted by mistake from the architect's report to the board of extra work, the board having approved some and rejected others of the items so reported. *Ib.*
9. *Statute of Frauds.—Vendor and Purchaser.*—Where lands are to be conveyed to the vendee upon his executing a written agreement to reconvey upon the performance of conditions, and he receives the deed without then executing the writing on his part, but engages to do so when he can get time to prepare it, which he never does, he can be compelled to perform it. *Chambers v. Butcher, 508*

CONTRIBUTION.

See TORTS.

CONVERSION.

See LANDLORD AND TENANT; PLEDGE, 2.

CONVEYANCE.

See COVENANTS; DEED; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE, 2; MILL; SHERIFF'S SALE, 14; WILL, 2.

Description Made Good by Reference.—A defective description in a deed or mortgage is made good by a reference to another deed which contains a true description. *Willson v. Brown, 471*

CORPORATIONS.

See CITY; DRAINING ASSOCIATION; TOWN.

1. *Mutual Benefit Society.—Knights of Honor.—Liability Upon Death of Member.*—An action will lie against the Supreme Lodge of the Knights of Honor, to recover the amount provided by the by-laws of such society to be paid upon the death of a member of a subordinate lodge, by the beneficiary. *Supreme Lodge, etc., v. Abbott, 1*
2. *Same.—Construction of By-Law or Order of Supreme Lodge.—Suspension of Lodge.*—An order or by-law of the Supreme Lodge, reading as follows: "Any lodge failing, neglecting or refusing to forward assessments within thirty days from the date of notice of the death, shall stand suspended, and that if a death occur in said lodge during such suspension, no death benefit shall be paid," is to be construed as if it read "if a death occur in said lodge during such suspension, no death benefit shall be paid during such suspension." *Ib.*
3. *Same.—Effect of Restoration of Suspended Lodge.—Answer.*—When the subordinate lodge is restored, then the rights of members to benefits are also revived; and an answer averring the suspension of a subordinate lodge, in an action against the Supreme Lodge to recover a death benefit by the beneficiary of a deceased member, but showing the restoration of the subordinate lodge a few days after the death of the member, is insufficient on demurrer. *Ib.*
4. *Contract.—Estoppel.*—A party who so contracts with a body acting as a corporation, as by implication to recognize the fact of its corporate existence, is estopped to question it collaterally, when sued upon the contract. *Smelser v. Wayne, etc., T. P. Co., 417*
5. *Stockholders' Liability.—Joinder of Parties.*—A creditor may, under section 3883, R. S. 1881, join all the stockholders of an insolvent corporation in one action. *Overmyer v. Cannon, 457*
6. *Same.—Pleading.—Complaint.*—In such action, an allegation in the complaint, that the defendants are stockholders, is a sufficient statement of fact without showing how they acquired stock. *Ib.*

7. *Same.—Judgment.—Apportionment of Liability.*—In such case, the judgment should be so moulded as to make the proper apportionment among the defendants, according to the amount of stock held by them respectively. *Id.*

COSTS.

See DECEDENTS' ESTATES, 1; PRACTICE, 7.

Issues.—Parties.—Where one of several defendants tenders separate issues, all of which are found against him, there is no error in adjudging the costs thereof against him personally. *Boyd v. Jackson, 525*

COUNTER-CLAIM.

See ACTION TO QUIET TITLE, 5; SUPREME COURT, 15.

Mortgage.—Foreclosure.—A counter-claim in a suit to foreclose a mortgage, whereby a defendant avers that he holds one of several notes secured by the mortgage, which is not due, and praying that his rights be protected, need not allege that the note is unpaid; nor is a counter-claim bad on demurrer if it pray too much relief. *Sperry v. Dickinson, 132*

COUNTY AUDITOR.

See DRAINAGE, 6.

COUNTY BOUNDARIES.

See REAL ESTATE, ACTION TO RECOVER, 3.

COUNTY BRIDGE.

See MECHANIC'S LIEN, 5.

COUNTY BUILDING.

See CONTRACT, 7, 8; COUNTY COMMISSIONERS.

COUNTY COMMISSIONERS.

See CONTRACT, 7, 8; DRAINAGE, 2 to 5; MANDAMUS, 3; STATUTE OF LIMITATIONS, 1.

1. *Building or Repairs of Public Works.—Contractor's Bond.—Laborers and Material-Men.*—Under sections 4246 and 4247, R. S. 1881, it is the duty of the board of county commissioners to refuse to receive any bid for the building or repairing of any bridge or other county building, unless such bid be accompanied by a good and sufficient bond, payable to the State of Indiana, signed by at least two resident freehold sureties, and guaranteeing the faithful performance and execution of the work bid for, and that, if the bidder receive the contract, the contractor shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished, and for boarding the laborers thereon. *Board, etc., v. Norrington, 190*
2. *Same.—Failure or Neglect to Require Bond.—Liability of County.*—If, however, the county commissioners fail or neglect, from any cause, to require of the bidder or contractor any such bond, the county can not be held liable to any third party for any loss or damages, which may be claimed to result from such failure or neglect. *Id.*

COUNTY TREASURER.

See STATUTE OF LIMITATIONS, 1; TAXES, 1.

COURTS.

See CONTEMPTS.

COVENANTS.

See MARRIED WOMAN, 2, 3.

1. *Warranty Deed.—Paramount Title.—Judgment.—Evidence.—Notice.—Estoppel.—Decedents' Estates.*—In a suit against executors for breach of

covenants of seizin and warranty in a deed of conveyance of lands by the testator, who was a remote grantor, alleging ouster of the plaintiff by judgment upon a paramount title, it appeared by the record thereof that suit was brought against the present plaintiff for possession; that the warrantor, on his own application verified, stating that he was the real party in interest, and bound to maintain the title to avoid damages on his covenants, became a defendant to the suit, and undertook the control of the defence; that, upon his death, the suit as to him abated, the present plaintiff was defaulted, and judgment of ouster rendered. But it was not shown that the warrantor had been formally notified of the pendency of that suit.

Held, that the record was evidence of sufficient notice, or a waiver thereof, and that the judgment concluded the executors of the warrantor, so that they could not offer evidence to show that the title of the plaintiff in the former suit was not paramount. *Morgan v. Muldoon*, 347

2. *Same.*—*Vendor and Purchaser.*—*Covenantor and Covenantee.*—Where the covenantee in a deed is sued for possession of the real estate by one claiming under a paramount title, the covenantee may relieve himself of the burthen of defending the suit by giving notice to his covenantor of the pendency of the suit, and thereby cast upon him the duty of defending the title, and bind him by the judgment. *Ib.*

COVERTURE.

See MARRIED WOMAN.

CREDITOR.

See FRAUDULENT CONVEYANCE, 2 to 4; HUSBAND AND WIFE, 4, 5; MORTGAGE, 2.

CRIMINAL LAW.

See LIQUOR LAW, 4.

1. *Sufficiency of Indictment.*—*Supreme Court.*—*Practice.*—*Waiver.*—Where it is assigned, as error, that the indictment is insufficient, and no defects therein, either in form or substance, are indicated in the assignment, and the appellant's counsel does not, in his brief, allude even to the alleged insufficiency of the indictment, the Supreme Court will consider the supposed error to be waived and abandoned. *Lindsey v. State*, 7
2. *Same.*—*Prosecution of Infant.*—*Consent.*—*House of Refuge.*—*Supreme Court.*—*Presumption.*—Where an infant, under the age of sixteen years, has been arraigned for a violation of any criminal law of this State, and it appears that the trial court, under section 6214, R. S. 1881, has arrested the proceedings and committed the accused to the guardianship of the House of Refuge, the Supreme Court will presume, where the record shows nothing to the contrary, that this action was had with the consent of the accused. *Ib.*
3. *Same.*—*Motion for New Trial.*—*Exception.*—*Verdict.*—*Judgment.*—*Practice.*—In criminal cases, it is cause for a new trial, that the verdict of a jury or finding of the court is contrary to law, under section 1842, R. S. 1881, and, unless the record shows that such cause was assigned in the motion for a new trial, the overruling of such motion, and an exception to the ruling, the question is not presented and will not be considered by the Supreme Court; nor will the court consider objections to the judgment, when the record fails to show that any objection or exception, either formal or substantial, was made to the judgment in the trial court. *Ib.*
4. *Notice of Appeal.*—*Practice.*—*Statute Construed.*—Under section 1887, R. S. 1881, service of the notice of an appeal to the Supreme Court upon the clerk of the court is required in cases in which the State appeals,

but where the defendant appeals, service upon the prosecuting attorney alone is sufficient. *Darr v. State, 11*

5. *Liquor Law.—Sale.—Verdict.—Supreme Court.*—Where, in a prosecution for a sale of intoxicating liquor without license, the evidence is conflicting, the Supreme Court will not disturb the verdict. *Ib.*
6. *Robbery.—Description of Property.—Indictment.*—Where, in a prosecution for robbery, the indictment shows that a more particular description of the property taken can not be given, it will not be quashed for want of a particular description. *McQueen v. State, 72*
7. *Same.—Arrest of Judgment.*—An indictment which sufficiently describes a part of the property taken, where several articles are severally described, will be sustained on a motion in arrest of judgment. *Ib.*
8. *Same.—Evidence.—Character of Defendant for Honesty.—Presumption.—Instruction.*—In a prosecution for robbery it is not error to refuse to instruct that, "in addition to the evidence upon the subject of character, the law presumes that the character of the defendant for honesty is good." *Ib.*
9. *Same.*—An instruction in such prosecution, that evidence of the defendant's character for honesty should be considered by the jury as tending to establish a defence, but if they should be satisfied beyond a reasonable doubt of his guilt, after a consideration of all the evidence, including the testimony in regard to his character for honesty, then, though they might believe he had such character before the robbery, it would not avail him as a defence or entitle him to an acquittal, is correct. *Ib.*
10. *Practice.—Information.*—Under section 1679, R. S. 1881, an information as well as an affidavit is necessary to an original prosecution for crime, and if there be no information, and no offer to file one, the cause may be ended by quashing the affidavit. *State v. First, 81*
11. *False Pretences.—Token and Writing.—Letter of Agency not Assignable.*—An appointment as agent to sell corn is not assignable; and, being bound to know this, the assignee has no right to rely upon a representation that the transfer would vest in him the title to the corn or the power to sell it. *Shaffer v. State, 221*
12. *Same.*—A false pretence, token or writing must be of a nature to deceive, such as the victim, under the circumstances, may rely on. *Ib.*
13. *Same.—False Use of Genuine Writing.—Statute Construed.*—A false use of a genuine writing is not the use of a false token or writing, within the meaning of section 2204, R. S. 1881; as, for example, where A., under a letter of authority, had sold B.'s corn, and afterwards, by means of the same letter, made another sale to another purchaser. *Ib.*
14. *Same.—Indictment.—Uncertainty.*—An indictment which is uncertain in respect to whether it charges a sale of corn, or a transfer by the defendant of a letter of authority to sell the same, is not good. *Ib.*
15. *Indictment.—Two or More Counts.—Verdict of Guilty on One Count.—Silence of Verdict.*—Where, on an indictment of two or more counts, the defendant is found guilty as charged in one count, and the verdict contains no finding as to the other counts, this silence of the verdict is equivalent to an express acquittal of the offences charged in such other counts. *Beatty v. State, 228*
16. *Same.—Discretion of Trial Court.—Supreme Court.*—Whether or not the State should be compelled to elect on which one of two or more counts the defendant will be prosecuted, is a question for the decision of the trial court in its discretion, and will not be reviewed by the Supreme Court. *Ib.*
17. *Same.—Embezzlement.—Felonious Intent.*—Where one is charged with

the embezzlement of money or property entrusted to him, an intent to feloniously appropriate it, at the time of the appropriation, is essential; and if the appropriation is made upon the belief, honestly entertained by the defendant, that he has lawful title or right to the money or property, the act is not criminal. *Ib.*

18. *Same.—Jurisdiction.*—Under section 1581, R. S. 1881, where property taken in one county, by embezzlement, has been brought into another county, the jurisdiction of the offence is in either county. *Ib.*
19. *Assault and Battery with Intent to Murder.—Conviction.—Verdict.*—Upon the trial of an information charging an assault and battery with intent to murder (R. S. 1881, section 1909), a verdict: "We, the jury, find the defendant guilty, and assess his fine at \$275, and that he be imprisoned in the county jail three months," must be deemed a conviction of the highest offence charged. *Rose v. State, 344*
20. *Same.—Presumption of Minority.*—In such case the presumption of defendant's full age will be deemed met and overcome, in aid of the verdict, by the counter presumption of minority afforded by section 258, Acts 1881, p. 164 (R. S. 1881, section 1833), and by the presumptions in favor of the action of the jury and of the court pronouncing the judgment. *Ib.*
21. *Amendment of Affidavit and Information.—Practice.*—Whether the refusal to permit an amendment of an affidavit and information was erroneous, cannot be considered unless the record shows what amendment was proposed. *State v. Frain, 532*
22. *Same.—Pleading.*—The affidavit and information for a misdemeanor need not show why the prosecution was not commenced by indictment. *Ib.*
23. *Continuance.—Absent Witness.*—An affidavit for a continuance, on account of the absence of a witness whose whereabouts is unknown, must state such facts as will enable the court to see the probability of the witness being found and his testimony obtained. *Burchfield v. State, 580*
24. *Same.—Murder.—Dying Declarations.—Res Gestæ.*—In a prosecution for murder, a declaration of the deceased, unless a part of the *res gestæ*, or made in view of approaching death, is not admissible, and an application for a continuance to obtain testimony in proof of such declaration, should show that it was made under such circumstances as to be competent. *Ib.*
25. *Same.—Preparation for Trial.*—It is not cause for a continuance, in a prosecution for murder, that, for the six weeks since the time of the homicide, the defendant has been in jail, without friends or relatives to hunt up witnesses and make like preparations for the trial, and that her attorneys have been busy in court. *Ib.*
26. *Same.—Facts Admitted.—Evidence.*—Facts admitted to be true, in order to avoid a continuance, can not be disputed on the trial. But an admission in a prosecution for murder, that shots were fired from a certain window towards the deceased at the time he was fatally shot, the defendant standing near, does not exclude the testimony of witnesses that they did not hear the shots from the window. *Ib.*
27. *Same.—Admissions.—Question of Fact.*—An admission by the State, in a prosecution for murder, that the deceased, when shot, stood about six feet from and with his right side towards the defendant, and that the ball entered his body near the center of the breastbone, and ranged backward and downward to the *lumbar vertebra*, does not enable the court to say that the defendant could not have fired the shot; and though it was also admitted that other shots were fired towards the deceased from a window which he was facing, it was a question for the jury whether the defendant inflicted the fatal wound. *Ib.*

CROSS COMPLAINT

See MARRIED WOMAN, 1; REPLEVIN, 5; VERDICT, 9; WITNESS.

DAMAGES.

See EMINENT DOMAIN; NEGLIGENCE; PLEDGE, 2; SLANDER, 1, 2; SUPREME COURT, 15.

DECEDENTS' ESTATES.

See COVENANTS, 1; DESCENTS; REAL ESTATE, ACTION TO RECOVER, 2; VENDOR AND PURCHASER, 5; WILL.

1. *Costs.—Statute Construed.—Action against Executor or Administrator and Co-obligor.*—A joint suit against an administrator or executor and the co-obligor of the deceased, upon a joint or joint and several obligation, is governed in respect to costs by the rules of the code, and not by section 62 of the decedents' estates act. *Lamson v. Nat'l Bank, etc., 21*
2. *Trust and Trustee.—Life-Estate.—Remainder-Man.*—A. having a life-estate in lands, united with B., the remainder-man, in conveying it. B. received \$1,200 of the purchase-money in cash, and took a note for \$800, payable to himself at the death of A., bearing annual interest at 6 per cent., payable to A. Afterwards, B. became liable to A. for half this interest, and paid it. B. died, and his administrator, in a report, stated that he was requested to hold \$400 assets of B.'s estate, as trustee for A., and to pay the interest annually to A., and prayed that that sum be not distributed. A. afterwards died.
Held, that the administrator of A. had no valid claim for the \$400 against the estate of B. *Belknap v. Caldwell, 270*
3. *Evidence.—Declarations.*—In an action against an administrator, the declarations of the intestate, in his own favor, made in the absence of the plaintiff, are not admissible in evidence on behalf of the estate. *Bristor v. Bristor, 276*
4. *Breaches of Administrator's Bond.—Pleading.*—A complaint on an administrator's bond, on relation of the persons entitled to distribution, assigning as breaches: 1. That the administrator has failed to account for \$2,000 interest by him collected; 2. That he has wrongfully withheld distribution for four years, though it was demanded; 3. That he has wrongfully delayed settlement of the estate for four years, is good as to each of the breaches. *Stanton v. State, ex rel., 463*
5. *Same.—Harmless Error.—Supreme Court.—Demurrer.—Practice.*—Where, in a suit upon an administrator's bond, it appears from the record that no damages have been allowed upon certain breaches which had been held good on demurrer, the ruling upon the demurrer, even if erroneous, is harmless, and not available as error in the Supreme Court. *Ib.*

DECLARATIONS.

See CRIMINAL LAW, 24; DECEDENTS' ESTATES, 3; EVIDENCE, 1.

DEED.

See CONVEYANCE; COVENANTS; MARRIED WOMAN, 1; WILL, 2.

1. *Execution.—Signature.*—It is not necessary that the grantor in a deed write his own signature, or make his mark. It may be done by another at his request, or he may adopt his name as written by another as his signature. *Nye v. Lowry, 316*
2. *Same.—Delivery.*—If a deed be delivered by the grantor to A., for the benefit of B., it is a good delivery. *Ib.*

DEFAULT.

See JUDGMENT, 3; REPLEVIN, 6, 7.

INDEX.

DELIVERY.

See DEED, 2; LANDLORD AND TENANT.

DEFECTS CURED BY VERDICT.

See PRACTICE, 19, 24.

DEMAND.

See PLEDGE, 1; PROMISSORY NOTE, 3; SHERIFF'S SALE, 2.

A demand is not necessary where it is shown that it would be unavailing.

Booth v. Fitzer, 66

DEMURRER.

See CITY, 2; DECEDENTS' ESTATES, 5; ESTOPPEL, 2; HUSBAND AND WIFE, 1; MANDAMUS, 1; MARRIED WOMAN, 8; PARTIES, 2; PLEADING, 1, 5 to 7; PRACTICE, 2, 3, 22; REAL ESTATE, ACTION TO RECOVER, 2; SUPREME COURT, 18.

DEMURRER TO EVIDENCE.

Practice.—The practice in this State requires the party demurring to evidence to set it out and to admit all the facts which it tends in any degree to prove, and hence the court is not required, in considering the demurrer, to weigh or reconcile conflicting evidence, nor to consider that which favors the demurrant when in conflict with other evidence against him.

Indianapolis, etc., R. R. Co. v. McLin, 436

DEPOSITION.

See ASSIGNMENT OF ERROR, 2; CONTINUANCE, 2.

DESCENTS.

1. *Illegitimate Child of Decedent.—Evidence.—Heir.*—An illegitimate child, claiming title to real estate of its father, must prove that he died intestate, without heirs resident in the United States. *Cox v. Rash*, 519
2. *Same.—Marriage.—Cohabitation and Reputation.*—Where a husband dies intestate without issue, leaving neither father nor mother, but an illegitimate child, his widow takes his entire estate, which upon her death descends to her heirs; and, in an action by such child to recover real estate so descending, it is not necessary that such heirs prove the marriage of the decedents by the record, nor by a witness of the ceremony, but may prove it by evidence of cohabitation and reputation. *Id.*

DESCRIPTIO PERSONÆ.

See REAL ESTATE, ACTION TO RECOVER, 2.

DESCRIPTION.

See CITY, 3 to 5; CONVEYANCE; CRIMINAL LAW, 6; DRAINAGE, 4, 7; MARRIED WOMAN, 3; MORTGAGE, 4; PLEADING, 12; REAL ESTATE, ACTION TO RECOVER, 3; SHERIFF'S SALE, 11; SUBROGATION, 3.

DILIGENCE.

See CONTINUANCE; PROMISSORY NOTE, 11; SUPREME COURT, 2.

DISAFFIRMANCE.

See FRAUDULENT CONVEYANCE, 4; MARRIED WOMAN, 1.

DISCRETION.

See CRIMINAL LAW, 16; PRACTICE, 13, 15.

DISMISSAL.

See JUDGMENT, 3.

DIVORCE.

Insanity after Marriage.—Failure to Provide.—Insanity arising subsequent to marriage is not a cause for divorce, nor is a failure to provide a support for the wife by the husband, resulting from such insanity. The statutory cause of the failure of the husband to make provision for his family, section 1032, R. S. 1881, does not apply where such inability arises from mental or physical disease. *Baker v. Baker, 146*

DRAINAGE.

1. *Estoppel.—Collateral Attack.*—Where a drain is established pursuant to the act of 1867, Acts 1867, p. 186, a party to the proceedings, having notice and being assessed for the construction thereof, can not maintain a suit for injury to his land thereby, or by reason of its construction thereon. He is bound by the proceedings before the county commissioners, unless appealed from, and can not attack them collaterally. *Powell v. Clelland, 24*
2. *Board of Commissioners.—Amendment.—Practice.*—Under the act of March 9th, 1875, Acts 1875, p. 97, concerning drainage, the petition could be amended by leave of the board, even as to a jurisdictional fact; and, on appeal, a like amendment could be made by leave of the circuit court. It follows that after such amendment by leave of the circuit court, on appeal, it would be error to dismiss the appeal for a defect so removed by the amendment. *Coolman v. Fleming, 117*
3. *Petition.—Public Utility.*—Under such act, a general statement in the petition, that the drain proposed would be of public utility, was sufficient without alleging also that it would benefit the public health. *Ib.*
4. *Same.—Description.*—Under such act, a petition was sufficiently definite as to the termini and course of the work proposed, which described it as beginning on the line between H. and W. counties, about 80 rods north of the northeast corner of sec. 36, t. 26 n., r. 10 east, and running thence in a westerly direction about 80 rods, thence in a southerly direction about 22 rods, thence in a westerly direction about 80 rods, thence in a southerly direction about 28 rods, thence in a westerly direction about 48 rods, thence in a southerly direction about 121 rods, thence in a westerly direction about 38 rods until it intersects another ditch named, on the west half of the n. w. quarter of sec. 36, same town and range, about 60 rods east of the west line, and about 80 rods south of the north line thereof. *Ib.*
5. *Same.—Notice.—Waiver.*—Parties who appeared before the county board in proceedings under such act, and made no objection to the notice, could not make such objection for the first time in the circuit court on appeal. *Ib.*
6. *Fees and Salaries.—County Auditor.—Repeal of Statute.*—Section 16 of the act of 1875, 1 R. S. 1876, p. 433, concerning drainage, so far as it relates to the fees of the county auditor, was repealed by implication by the 11th section of the later act of the same year, concerning fees and salaries, 1 R. S. 1876, p. 467. *Wright v. Board, etc., 335*
7. *Description of Land Assessed.*—A ditch assessment must describe the land with such certainty that it may be definitely ascertained and located. "A part" of a certain parcel of land is too indefinite to enable any one to ascertain what was intended, and such description renders an assessment void. *Boatman v. Macy, 490*
8. *Same.—Complaint to Enforce Assessment.*—A complaint to enforce a ditch assessment is not good as a complaint in assumpsit, where it avers that the defendant neither requested the work done nor promised to pay for it. *Ib.*

DRAINING ASSOCIATION.

1. *Corporation Debts.—Judgment.—Complaint.—Individual Liability.—Statute Construed.*—A complaint against members of an association formed under the act of June 12th, 1852, authorizing the construction of levees and drains, and the supplemental act of June 4th, 1861, to enforce their liability for the debts of the corporation, under sec. 4 of the act of March 4th, 1859, in which the plaintiff claims as assignee of a judgment for the debt, rendered against the corporation, and sets out an assignment of the judgment to him, and a bill of particulars of the services for which the judgment was rendered, must be regarded as a suit on the judgment. *Trippe v. Huncheon, 307*
2. *Same.—Stockholders' Liability.*—The liability of the members of the association, in such case, is not for the judgment, but for the original debt, as individuals and not as corporators, and a complaint against them founded upon the judgment against the corporation is bad on demurrer. *Id.*

DUPLICITY.

See VENDOR AND PURCHASER, 1.

DYING DECLARATIONS.

See CRIMINAL LAW, 24.

EASEMENT.

TRESPASS.

EJECTMENT.

See COVENANTS, 2; JUDICIAL SALE, 4; MARRIED WOMAN, 1; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S SALE, 1, 2.

EMBEZZLEMENT.

See CRIMINAL LAW, 17, 18.

EMINENT DOMAIN.

Remedy.—Damages.—Where private property is taken for public use without compensation, and no other remedy is given to the owner, he has the common law remedy by suit for the injury. *Board, etc., v. Miller, 572*

ENDORSER AND ENDORSEE.

See PROMISSORY NOTE, 4, 8 to 12, 14.

EQUITY OF REDEMPTION.

See SHERIFF'S SALE, 6.

ERASURE.

See PROMISSORY NOTE, 5; REVIEW OF JUDGMENT, 2.

ESTOPPEL.

See CORPORATIONS, 4; COVENANTS, 1; DRAINAGE, 1; GUARDIAN'S BOND; MARRIED WOMAN, 1; MORTGAGE, 1; SHERIFF'S SALE, 10.

1. *Estoppel in Pais.*—As a rule there can not be an estoppel *in pais* unless there has been a change in the position of the parties in respect to the matter in dispute, to the detriment of the one who pleads the estoppel. *Stringer v. Northwestern, etc., Co., 100*
2. *Practice.*—A party is not estopped to insist upon such defences as arise upon a demurrer to the complaint. *Boatman v. Macy, 490*

EVIDENCE.

See ACTION TO QUIET TITLE, 1; BASTARDY, 1; BILL OF EXCEPTIONS, 2, 3; CONTRACT, 6; COVENANTS; CRIMINAL LAW, 5, 8, 9, 24, 26, 27; DECEDENTS' ESTATES, 3; DEMURRER TO EVIDENCE; DESCENTS; HUSBAND AND WIFE, 2, 3; INSTRUCTION, 1; JUDGMENT, 8; MALICIOUS PROSECUTION, 1; MARRIED WOMAN, 4; MECHANICS' LIEN, 4; MORTGAGE, 5; NEGLIGENCE, 2, 3, 4, 13; NEW TRIAL; PRACTICE, 5, 6, 8, 10, 12, 21, 26; PRINCIPAL AND SURETY, 2; PROMISSORY NOTE, 1, 4, 6, 12, 14; RAILROAD, 1, 3, 5; REAL ESTATE, ACTION TO RECOVER, 5; REVIEW OF JUDGMENT, 2; SHERIFF'S SALE, 1; SLANDER; SOLDIER'S BOUNTY; SUPREME COURT, 1, 3, 4, 8, 10, 12 to 16, 22; VENDOR AND PURCHASER, 5.

1. *Assessment List.—Ownership of Property.—Husband and Wife.—Declarations.—Assessor.—Witness.*—Where the assessment list of a husband is put in evidence, showing property, claimed in the suit by his wife, to have been listed by the husband in his own name, with a view to contradict his testimony as a witness given on the trial, it is proper in his support to show by the assessor that at the time of making the list he stated that his wife owned the property. *Hadley v. Hadley, 75*
2. *Transcript.—Authentication.*—A transcript of a judicial record of a court of superior jurisdiction of this State, properly authenticated, need not show that the judge signed the proceedings of each day; the authentication is itself evidence of that fact. *Adams v. Lee, 587*
3. *Marriage.—Cohabitation and Reputation.*—Where a husband dies intestate without issue, leaving neither father nor mother, but an illegitimate child, his widow takes his entire estate, which, upon her death, descends to her heirs; and, in an action by such child to recover real estate so descending, it is not necessary that such heirs prove the marriage of the decedents by the record, nor by a witness of the ceremony, but may prove it by evidence of cohabitation and reputation. *Cox v. Rash, 519*

EXCEPTION.

See CRIMINAL LAW, 3; JUDGMENT, 5; PRACTICE, 4, 18, 21; SUPREME COURT, 18.

EXCESSIVE DAMAGES.

See NEGLIGENCE, 9.

EXECUTION.

See FRAUDULENT CONVEYANCE, 1; JUDICIAL SALE; PARTITION, 1; REDEMPTION; REPLEVIN, 1, 3; SHERIFF'S SALE; SUBROGATION, 1; VOLUNTARY ASSIGNMENT.

EXEMPTION.

See PROMISSORY NOTE, 4.

EXHIBITS.

See PLEADING, 3, 9, 10, 13; PROMISSORY NOTE, 13.

EXTENSION OF TIME.

See PRINCIPAL AND SURETY.

FALSE PRETENCES.

See CRIMINAL LAW, 11 to 13.

FEE SIMPLE.

See PARTITION, 2.

FEES AND SALARIES.

See DRAINAGE, 6; STATUTE OF LIMITATIONS, 1.

FINDING.

See JUDICIAL SALE, 4; LIQUOR LAW, 1; NEGLIGENCE, 1; PRACTICE, 8; SPECIAL FINDING.

FORECLOSURE.

See COUNTER-CLAIM; HUSBAND AND WIFE, 1; JUDICIAL SALE, 3, 4; MARRIED WOMAN, 2 to 5; RECEIVER, 2; SHERIFF'S SALE, 1, 2, 6.

FORGERY.

See PROMISSORY NOTE, 14.

FORMER ADJUDICATION.

Action to Enjoin Enforcement of Judgment.—The judgment, in an action by two to enjoin the enforcement of a joint judgment against them, is no bar to a separate action by one of them to enjoin the enforcement of the same judgment against him, on grounds personal to himself, and in which his co-defendant has no interest. *Bilsland v. McManomy*, 139

FRAUD.

See REPLEVIN, 2.

FRAUDULENT CONVEYANCE.

See HUSBAND AND WIFE, 2 to 5; MORTGAGE, 2, 3.

1. *Execution.—Parol Trust.—Agreement.—Complaint.*—Complaint to restrain the levy of an execution against another, upon lands of the plaintiff. Answer, that in 1868 the lands were conveyed by the execution defendant to the plaintiff, without consideration, upon a parol agreement that the latter would hold in trust for the former; and that afterwards in 1872, when the former became indebted to the execution plaintiff, he made a false and corrupt pretence of a purchase of the lands by the plaintiff from the execution defendant, in fraud of creditors, money being paid therefor, which was secretly returned, at which time the execution defendant had, and still has, nothing subject to execution.

Held, that the answer was insufficient on demurrer.

Held, also, that said trust, if a trust at all, was an express one, and could not be created by parol. *Dunn v. Dunn*, 42

2. *Action against Grantor.*—A creditor who has no lien upon the property of his debtor can not maintain an action of assumpsit against a person who has accepted a conveyance of the property, for the purpose of defrauding the creditor, and who has conveyed the property to another at the instance and for the benefit of the debtor, without retaining any portion of it, or receiving any benefit from it.

Tasker v. Moss, 62

3. *Preference of Creditor.*—A failing debtor may prefer one creditor over another, and, to that end, may use property bought on credit of one for the payment of another. *O'Donald v. Constant*, 212

4. *Same.—Rescission and Affirmation of Contract.—Attachment.*—While a creditor of whom the debtor had bought goods, not intending to pay for them, but to use them in preferring other creditors, may doubtless disaffirm the sale, and recover his goods, unless resold to an innocent purchaser, yet, by bringing an attachment suit against his debtor, he affirms the sale, and takes the place of an ordinary creditor. *Ib.*

GIFT.

See LIQUOR LAW, 4; PROMISSORY NOTE, 6.

GRAVEL ROAD.

1. *Turnpike.—Tolls.*—Under the general statute providing for the construc-

tion of macadamized, gravel and plank roads, it is not necessary, to warrant the collection of tolls, that the "hard and even surface" required by section 3627, R. S. 1881, should be wide enough for vehicles to pass each other thereon. *Wayne, etc., Co. v. Moore, 208*

2. *Trespass*.—Where a county, in constructing a free gravel road under the act of 1877, Acts 1877, p. 87, without agreement or condemnation, as the act provided, entered upon lands and took gravel, the county was liable as a trespasser. *Board, etc., v. Miller, 572*
3. *Remedy*.—Where private property is taken for public use without compensation, and no other remedy is given to the owner, he has the common-law remedy by suit for the injury. *Ib.*

GUARDIAN AND WARD.

See GUARDIAN'S BOND.

1. *Sale of Ward's Real Estate.—Payment by Cancelling Guardian's Debt.—Promissory Note*.—A guardian has no authority to receive his own note in payment of a claim belonging to his ward, and where a person purchases from him the real estate of his ward, and in payment of the price surrenders a note he holds against the guardian, and transfers notes held by him upon others, the guardian is liable on his bond for the price of the land. *Heflin v. Bevis, 388*
2. *Maintenance of Ward.—Management of Ward's Estate.—Complaint.—Interest*.—A complaint to set aside a guardian's current and final reports alleged that the ward resided with the guardian as a member of his family and labored for him to the value of \$10 per month, all of which the guardian in his reports concealed from the court, and charged the ward \$566 for his board; that the guardian received sums of money specified, of the ward's estate, which could have been loaned at 10 per cent., some of which he mingled with his own and loaned, but gave the ward no credit for interest. *Held*, that the complaint was good on demurrer. *Marquess v. LaBaw, 550*
3. *Same.—Ward.—Member of Guardian's Family*.—It is a general rule, subject to exceptions, that a guardian who makes his ward a member of his family, and receives the ward's labor as such, can not charge for his board. *Ib.*
4. *Same*.—A guardian must use reasonable prudence and ordinary diligence in managing his ward's estate, and is liable for such loss as results from a failure to do so. *Ib.*

GUARDIAN'S BOND.

Appointment of Guardian.—Recitals in Bond.—Estoppel of Sureties.—In an action on a guardian's bond, the sureties therein are estopped by the recital in the bond, executed by them, of the appointment of the guardian, to controvert the fact therein recited that he was such guardian at the time the bond was executed. *State, ex rel., v. Mills, 126*

HARMLESS ERROR.

See DECEDENTS' ESTATES, 5; INSTRUCTIONS, 2; PRACTICE, 9, 23, 26; SUPREME COURT, 22, 24.

HEIR.

See DESCENTS; RECEIVER, 2; WILL; WITNESS.

HIGHWAY.

See NEGLIGENCE, 7 to 12.

HOUSE OF REFUGE.

See CRIMINAL LAW, 2.

HUSBAND AND WIFE.

See DESCENTS, 2; DIVORCE, EVIDENCE, 1; JUDICIAL SALE, 3, 4; MARRIED WOMAN; MECHANIC'S LIEN, 1, 3; PARTITION, 1; PROMISSORY NOTE, 6; SHERIFF'S SALE, 13.

1. *Rent During Year Allowed for Redemption.—Complaint.—Demurrer.*—A complaint against husband and wife to recover the rent of real estate for the year allowed for redemption after sale upon a decree of foreclosure is not bad, as against the husband, upon joint demurrer, because of the joinder of the wife. *Wilcox v. Moudy*, 219
2. *Fraudulent Conveyance.—Volunteer.—Pleading and Proof.*—The proof must support the averments of a pleading, and in an action by a creditor of the husband to set aside a conveyance to the wife as fraudulent, it being alleged that she paid nothing and held the title as a volunteer, the action fails if she is shown to have paid a part of the price with her own money. *Bragg v. Stanford*, 234
3. *Same.—Instruction.—Evidence.—Possession and Ownership.*—In an action to subject property held by the wife to the payment of her husband's debts, it was not error to refuse to instruct, that when the husband is permitted by the wife to exercise control and ostensible ownership, and to hold himself out to the world as the real owner of her personal property, the law will in respect to creditors treat the property as his. *Ib.*
4. *Same.—Personal Property.—Title.—Presumption.*—The general creditor who has acquired no specific interest in a chattel, as by buying or taking a lien upon it, has no right, to the prejudice of the true owner, to deal with the one in possession on the presumption of his being the owner. Possession does not constitute or conclusively show the ownership of a chattel. *Ib.*
5. *Same.—Preference of Creditors.*—The rule, that a failing debtor may prefer one creditor over another, applies to a husband indebted to his wife. *Ib.*

INDICTMENT.

See CRIMINAL LAW, 1, 6, 7, 14, 15.

INFANT.

See BASTARDY, 2; CRIMINAL LAW, 2, 20; MARRIED WOMAN, 1.

INJUNCTION.

See ACTION TO QUIET TITLE, 1; FORMER ADJUDICATION; FRAUDULENT CONVEYANCE, 1; PLEADING, 4; PROMISSORY NOTE, 9; TAXES; TOWN, 1.

INSANITY.

See DIVORCE.

INSOLVENCY.

See PROMISSORY NOTE, 4; RECEIVER, 2.

INSTRUCTIONS.

See CRIMINAL LAW, 8, 9; HUSBAND AND WIFE, 3; LIQUOR LAW, 4; MALICIOUS PROSECUTION; NEGLIGENCE, 4, 11, 12; PRACTICE, 17, 25; REPLEVIN, 1; SLANDER, 2; SUPREME COURT, 14, 22.

1. *Evidence.—Practice.*—An instruction to the jury which recites a part only of the evidence, excluding some which is material, and declaring that the evidence recited will not justify a recovery, should not be given. *Groves v. Hall*, 202
2. *Practice.—Harmless Error.*—Instructions should be pertinent to the issues made by the pleadings, but an error in this respect may sometimes be harmless. *Wayne, etc., Co. v. Moore*, 208

3. *Special Instructions, How Made Part of Record.*—Instructions given must be signed by the judge, and in order to be made part of the record, under sections 533 and 535, R. S. 1881, must be filed, and the fact of the filing must be shown in the transcript. *O'Donald v. Constant, 212*
4. *Practice.*—It is error to give inconsistent instructions to the jury. *Bitting v. Ten Eyck, 421*

INTEREST.

See GUARDIAN AND WARD, 2; PROMISSORY NOTE, 5.

INTERROGATORIES.

See LIQUOR LAW, 1; PRACTICE, 4; VERDICT, 2 to 4, 8.

INTOXICATING LIQUOR.

See LIQUOR LAW.

ISSUE.

See ACTION TO QUIET TITLE, 4; COSTS; LIQUOR LAW, 2; PARTITION, 3; PRACTICE, 6, 12, 13; PROMISSORY NOTE, 1, 14; VERDICT, 9, 10.

JUDGMENT.

See BANKRUPTCY; CONTRACT, 1; CORPORATIONS, 7; COVENANTS; CRIMINAL LAW, 3, 7; DRAINING ASSOCIATION; FORMER ADJUDICATION; JUDICIAL SALE, 4; PARTITION, 1; PLEADING, 4; PROMISSORY NOTE, 5; REPLEVIN, 5, 6; SHERIFF'S SALE, 5, 8, 9, 11, 16; SPECIAL FINDING; SUBROGATION, 1; SUPREME COURT, 6, 23; VERDICT, 1, 6, 9.

1. *Misnomer of Party.*—*Abatement.*—*Practice.*—A defendant who is sued by a wrong name, is served with process, and fails to plead the misnomer in abatement, is bound by the judgment. *Bloomfield R. R. Co. v. Burress, 83*
2. *Same.*—*Action Upon Judgment.*—*Complaint.*—In an action upon a judgment, an averment in the complaint, that the judgment was rendered against the defendant by another name, is sufficient to show that he is bound by the judgment. *Ib.*
3. *Same.*—*Record.*—*Dismissal.*—*Appearance.*—*Default.*—*Presumption.*—*Supreme Court.*—Where the record shows the dismissal of an action for want of prosecution, and afterwards the defendant's withdrawal of his appearance, a default and judgment rendered against the defendant, the Supreme Court will presume, the record showing nothing upon the subject, that the cause was properly reinstated. *Ib.*
4. *Same.*—*Collateral Attack.*—*Jurisdiction.*—Where a domestic judgment is collaterally attacked, and the record is silent upon the subject, jurisdiction of the person will be presumed. *Ib.*
5. *Entry.*—*Misprision.*—*Motion to Correct.*—*Bill of Exceptions.*—A motion to correct a misprision in the entry of a judgment is not, like a complaint, a part of the record on appeal, without a bill of exceptions or order of the court, and the ruling of the court on such motion presents no question, unless excepted to and the grounds of objection shown. Such proceeding is not governed by section 396, R. S. 1881. *Ellis v. Keller, 524*
6. *Same.*—*Action Brought in Term Time.*—*Mistake in Name of Party in Endorsement on Complaint.*—*Jurisdiction.*—When an action is commenced for a day in term time later than the first, a mistake in the name of the plaintiff in the endorsement upon the complaint of the return day, as *Kelley* for *Keller*, the true name being in the body of the complaint and in the summons, which is returned duly served, and judgment thereon taken by default, does not affect the jurisdiction of the court. *Ib.*
7. *Assignment.*—*Attestation.*—*Set-Off.*—An assignment of a judgment, not attested as the statute requires (R. S. 1881, section 603), is not void; it is, at least, good in equity, and vests such a title in the assignee as

entitles him to use it as a set-off to a judgment held by the defendant thereto against him. *Adams v. Lee, 587*

8. *Same.—Lien of Attorney.—Evidence of Fees.*—The lien of an attorney for fees, upon a judgment entered as the statute (R. S. 1881, section 5276,) requires, is paramount to the right of the defendant to set off a judgment held by him against the plaintiff; but to hold it against such set-off, proof of the amount due for the fees is necessary. *Ib.*

JUDICIAL KNOWLEDGE.

See REAL ESTATE, ACTION TO RECOVER, 3.

JUDICIAL RECORD.

See EVIDENCE, 2.

JUDICIAL SALE.

See HUSBAND AND WIFE, 1; MARRIED WOMAN, 5, 6; PARTITION, 1; SHERIFF'S SALE.

1. *Public Policy.—Volunteer.—Equitable Relief.—Subrogation.*—Public policy forbids that a purchaser of land sold by virtue of a decree, judgment or other lien, should be deemed to be a volunteer, and be denied equitable relief, in case of the invalidity of the sale, merely because he had no personal interest to protect, and purchased for the sake of the investment only. *Willson v. Brown, 471*
2. *Same.—Caveat Emptor.*—The doctrine of *caveat emptor* applies to the purchaser at an invalid judicial sale or sale by a public officer, in respect to any claim for recourse upon the party for whose benefit the sale was made, but not so as to deny a remedy against him whose debt has been, as to his creditor, paid or extinguished. *Ib.*
3. *Wife's Inchoate Interest in Real Estate Sold on Execution.—Mortgage.—Constitutional Law.*—The inchoate interest of a married woman in the lands of her husband, not exceeding \$20,000, does not become absolute under the act of 1875, sections 2508 and 2509, R. S. 1881, when sold upon a judgment rendered since the act took effect foreclosing a mortgage executed by the husband alone before the passage of the law; such act, as applied to such contracts, would impair their obligation, and it can not be held to embrace them. *Parkham v. Vandeverter, 544*
4. *Husband and Wife.—Mortgage.—Ejectment.—Judgment.—Redemption.*—In ejectment to recover possession of a tract of land, the court found specially that the plaintiff had, under a foreclosure of a mortgage, dated in 1876, for purchase-money, against the defendant alone, obtained a proper sheriff's deed for the land; that when the mortgage was made the defendant had a wife, still living, who did not join in the mortgage, and, as a conclusion of law, found the plaintiff entitled to possession of the whole of the land, and judgment was so entered.
Held, that the legal effect of the finding and judgment was only to give the plaintiff possession of such interest in the land as the defendant may have had.

Held, also, that the wife had no right to retain possession of an undivided third of the land, and had no right in it save to redeem.

Baker v. McCune, 585

JURISDICTION.

See CHANGE OF VENUE; CRIMINAL LAW, 18; JUDGMENT, 4, 6; REAL ESTATE, ACTION TO RECOVER, 4; REPLEVIN, 9.

JUROR.

See PRACTICE, 4.

JURY.

See MALICIOUS PROSECUTION, 2.

JUSTICE OF THE PEACE.

See REPLEVIN, 9, 10; SHERIFF'S SALE, 16, 17, 18.

KNIGHTS OF HONOR.

See CORPORATIONS, 1 to 3.

LANDLORD AND TENANT.

Delivery of Produce as Rent.—Conversion.—By the terms of a lease, a tenant agreed to deliver to his landlord one-third of the grain crop, in the bushel, in pens on the leased premises. Upon threshing the wheat the plaintiff presented himself with sacks and demanded the delivery of one-third of the wheat, which the tenant refused (the whole being then in one pile), but separated it into two parts, taking two-thirds himself, and delivering the remaining third to S., who had no right to it, and who hauled it away, the landlord protesting. In a suit by the landlord against the tenant and S. for conversion—

Held, that the landlord was the owner of the wheat converted and could maintain the suit; that before separation of the wheat into parts the landlord and tenant were tenants in common thereof, and that when the tenant exercised his right to separate, and actually took two-thirds to himself in severalty, the landlord at once became sole owner of the other third. *Scott v. Ramsey, 330*

LEASE.

See LANDLORD AND TENANT.

LEGAL TENDER.

See MONEY; REDEMPTION.

LESSOR AND LESSEE.

See RAILROAD, 3.

LEVY.

See REPLEVIN, 1, 3; SHERIFF'S SALE, 8, 9.

LICENSE.

See LIQUOR LAW.

LIFE-ESTATE.

See DECEDENTS' ESTATES, 2; WILL, 2, 3.

LIEN.

See JUDGMENT, 8; MECHANICS' LIEN; MORTGAGE; PROMISSORY NOTE, 7; SHERIFF'S SALE, 6, 7, 16, 17; VENDOR AND PURCHASER, 5; VOLUNTARY ASSIGNMENT.

LIQUOR LAW.

See CRIMINAL LAW, 5.

1. *Application for License.—Remonstrance.—Verdict.—Interrogatories.*—Where an application is made to obtain a license to retail intoxicating liquor, to which a remonstrance is filed on account of the alleged immorality and other unfitness of the applicant, and upon such issue the jury return a general verdict for the remonstrators, with answers to interrogatories that the applicant is a resident of the State, is of proper age and not in the habit of becoming intoxicated, such facts so found are not inconsistent with the general verdict, as that in effect finds that the applicant is an immoral man and unfit to be entrusted with a license. *Hill v. Perry, 28*
2. *Same.—Burden of Proof.—Open and Close.—Practice.*—In such proceeding, the burden of the issue is upon the applicant, and the refusal of

the court to award him the open and close of the argument is such error as will reverse the judgment against him. *Ib.*

3. *City.—Power to Prohibit Sale of Intoxicating Liquor on Sunday.*—A city, organized under the general law for the incorporation of cities, has no power to pass an ordinance prohibiting the sale of intoxicating liquors within the city on the Sabbath day. *Loeb v. City of Attica, 175*
4. *Sale or Gift.—Question of Fact.—Instruction.*—Whether the delivery of intoxicating liquor, by an unlicensed saloon keeper, to one who received and drank it, was intended by the parties to be a sale or a gift, is a question of fact to be determined from all the evidence; and an instruction that if "the same was not then and there declared to be a gift, the law implies an agreement to pay the reasonable value thereof, and the transaction is a sale," is erroneous. *Keiser v. State, 379, 600*
5. *License.*—A license to retail intoxicating liquors for one year, granted on September 1st, but not received and paid for until the third day of that month, will not include and protect sales made by the licensee on September 4th, of the following year. *Schwarm v. State, 470, 602*

LIS PENDENS.

See MORTGAGE, 2; RECEIVER.

MALICIOUS PROSECUTION.

1. *Probable Cause.—Evidence.—Instruction.*—An acquittal of a criminal charge is not evidence of the want of probable cause for the prosecution, and it is not error in a suit for malicious prosecution to refuse to instruct that a verdict acquitting the plaintiff of a criminal charge is *prima facie* evidence of his innocence. *Bitting v. Ten Eyck, 421*
2. *Same.—Invading Province of Jury by Instruction.*—An instruction to the jury, in such a suit, that it appears there were two such suits (forcible entry and detainer), one criminal and the other civil; both were undertaken, it would appear, on the theory that B. (the plaintiff) was wrongfully and forcibly detaining from the defendant fifteen acres of land,—is erroneous, inasmuch as it states an inference from the evidence, which it was the province of the jury and not the court to draw. *Ib.*

MANDAMUS.

See SCHOOL LAW.

1. *Practice.—Affidavit.—Demurrer.*—The sufficiency of an affidavit, upon which a mandate is asked, may be tested by demurrer. *Pfister v. State, ex rel., 382*
2. *Same.—Alternative Writ.—Waiver.*—The parties may waive the issuing of the alternative writ of mandate. *Ib.*
3. *Same.—Board of Commissioners.—Railroad Aid Tax.*—A mandate will lie against a board of county commissioners to compel them to take action upon the petition of a taxpayer of a township asking them to take stock in a railroad company to the amount of money collected on a tax voted for that purpose. *Ib.*

MANDATE.

See MANDAMUS; SCHOOL LAW.

MARRIAGE.

See EVIDENCE, 3; DESCENTS, 2; DIVORCE.

MARRIED WOMAN.

See DESCENTS, 2; DIVORCE; EVIDENCE, 1; HUSBAND AND WIFE; JUDICIAL SALE, 3, 4; MECHANIC'S LIEN, 1, 3; PARTITION, 1; PROMISSORY NOTE, 7.

1. *Infant.—Disaffirmance of Deed Executed During Coverture and Minority.—Action to Quiet Title.—Complaint.—Estoppel.*—It is a question of fact

- whether the disaffirmance of a deed made by an infant *feme covert* was unreasonably delayed after she had reached her majority; and in an action by her to recover real estate so conveyed, a cross complaint by the defendant, to quiet the title thereto on account of such delay, should, besides alleging the lapse of time and circumstances, aver that the delay had been unreasonable. *Stringer v. Northwestern, etc., Co.*, 100
- Quere.*—Whether an infant *feme covert*, who has conveyed her real estate, must disaffirm on arriving at full age, or may she do so within a reasonable time after becoming discover? and can she while under coverture be bound by an estoppel *in pais* against disaffirming her deed made when she was an infant and under coverture? *Ib.*
2. *Mortgage.—Husband and Wife.—Covenant.—Promissory Note.*—If a married woman joins her husband in a mortgage of her lands to secure the husband's debt, the mortgage containing a covenant to pay the debt, it is good; otherwise, if she give her note, and the covenant in the mortgage is to pay the note. *Sperry v. Dickinson*, 132
3. *Same.—Description.*—A covenant in a mortgage to pay "the sum of money above secured," referring to a previous description of notes by dates, amount, rate of interest and time of maturity, is an agreement to pay the debt. *Ib.*
4. *Same.—Assignment of Mortgage.—Evidence.*—In a suit by an assignee of a mortgage of the wife's land, an assignment of her notes secured thereby on the mortgage record, though they are void, is a good equitable assignment of the debt, and, when the general denial is in, the assignment is a necessary part of the plaintiff's evidence against the wife, but the notes are not. *Ib.*
5. *Mortgage.—Redemption.—Judicial Sale.—Vendor and Purchaser.—Statute Construed.—Practice.*—Where during marriage a husband purchases lands, and gives a mortgage for purchase-money, the wife, has in consequence of section 2495, R. S. 1881, no inchoate interest in the land, as against the mortgagee, and, therefore, no interest vests in her, under section 2508, upon sale of the land under a decree of foreclosure against the husband alone, and in such case the purchaser may, upon suit against her, obtain a decree fixing a time within which she must redeem or be barred. *Baker v. McCune*, 339
6. *Inchoate Interest in Husband's Real Estate.—Judicial Sale.*—The inchoate interest of a married woman in her husband's land does not become vested by judicial sale thereof upon a judgment rendered prior to August 14th, 1875, R. S. 1881, sections 2508-9. *Westerfield v. Kimmer*, 365
7. *Same.—Husband and Wife.—Trust and Trustee.—Personal Property of Wife.—Resulting Trust.*—Prior to July 24th, 1853, the personal property of the wife belonged to the husband absolutely, and an agreement by him to invest it in real estate for her was without consideration and void, and real estate so purchased by him, the title to which was taken in his own name, would not be subject to a resulting trust in her favor. *Ib.*
8. *Execution of Replevin Bond.—Complaint.*—In 1878 a replevin bond executed by a married woman, in this State, was, as to her, void, and in a suit upon it against her, if the complaint disclose her coverture, a demurrer to it by her is well taken. *Coverdale v. Alexander*, 503

MASTER AND SERVANT.

See NEGLIGENCE, 3, 7 to 13.

MASTER COMMISSIONER.

Report.—Practice.—Bill of Exceptions.—Where a cause is referred to a master commissioner to "hear and report the evidence and his finding of

facts therein to the court," the report is no part of the record, unless made so by bill of exceptions or order of court. *Stanton v. State*, 463

MEASURE OF DAMAGES.

See PLEDGE, 2.

MECHANIC'S LIEN.

See PLEDGE, 1.

1. *Married Woman.—Statutes Construed.*—Section 5116, R. S. 1881, forbids a wife to encumber her lands save by deed in which the husband joins; but the later statutes (section 5293 *et seq.*) provide for a mechanic's lien generally, and construing them together, giving the later effect when in conflict with the former, a married woman may create such lien, like a *feme sole*. *Stephenson v. Ballard*, 87
2. *Same.—Notice.—Time of Filing.—Contract.*—A lien for labor and materials in repairing a building, upon an entire contract, may be acquired by filing the notice within sixty days after the last work is done. *Ib.*
3. *Same.—Husband and Wife.—Pleading.—Payment.—Practice.*—In a suit against husband and wife to enforce a mechanic's lien upon lands of the wife, where the husband answers separately that he made the contract without the wife's knowledge or consent, and paid for the same a sum named which was accepted as payment, it is error to strike the answer out, so much of it as alleges payment being pertinent. *Ib.*
4. *Same.—Payment.—Pleading and Proof.*—Proof of payment is not admissible under the general denial, in a suit to enforce a mechanic's lien, nor need the plaintiff prove non-payment though he must aver it. *Ib.*
5. *County Bridge.—Public Policy.*—A county bridge is not a "building," within the meaning of section 5293, R. S. 1881, in relation to the liens of mechanics, laborers or material-men, and public policy forbids either the acquisition or enforcement of any such lien upon or against a county bridge. *Board, etc., v. Norrington*, 190

MEMBER OF FAMILY.

See GUARDIAN AND WARD, 2 to 4.

MERGER.

See CONTRACT, 1.

MESNE PROFITS.

See SHERIFF'S SALE, 2.

MILL.

See TRESPASS, 1.

Watercourse.—Artificial Stream Appurtenant to Saw-Mill.—Conveyance.—Tort.—If the owner of land, upon which he has a saw-mill, conducts water by an artificial channel to the mill, to be used in its operation, and afterwards sells and conveys the mill and the land upon which it stands, the right to the flow of water in such channel will be carried by implication as appurtenant to the mill, and a diversion of the water by the grantor will be deemed an actionable wrong.

Eshelman v. Snyder, 498

MINOR.

See BASTARDY, 2; CRIMINAL LAW, 2, 20; MARRIED WOMAN, 1.

MISJOINDER OF PARTIES.

See PARTIES, 2.

MISNOMER.

See JUDGMENT, 1, 2, 6.

MISPRISION.

See JUDGMENT, 5.

MISTAKE.

See CONTRACT, 8; JUDGMENT, 5, 6; SUBROGATION, 3.

MONEY.

See REDEMPTION.

Legal Tender.—In legal acceptance, money means gold or silver coinage or notes made a legal tender by a valid statutory enactment. National bank notes are, therefore, not money. A creditor may receive bank notes as money, but he can not be compelled to do so. *Boyd v. Olney*, 294

MORTGAGE.

See CONTRACT, 1; COUNTER-CLAIM; JUDICIAL SALE, 3, 4; MARRIED WOMAN, 2 to 6; PLEADING, 3; RECEIVER, 2; REPLEVIN, 8; SHERIFF'S SALE, 1, 2, 6, 7, 12; SUBROGATION; VENDOR AND PURCHASER, 1, 5.

1. *Subrogation.—Estoppel.—Vendor and Purchaser.—Payment and Entry of Satisfaction.*—A person who purchases real estate which is subject to a mortgage and a judgment lien, and who pays the mortgagee the prior lien and causes an entry of satisfaction to be entered of record without any knowledge of the judgment, is entitled to be subrogated to the rights of the mortgagee as against the judgment creditor and is not estopped to assert such right against such creditor who purchases the property at execution sale upon the judgment after the entry of satisfaction. *Ayers v. Adams*, 109
2. *Same.—Preferred Creditor.—Fraudulent Conveyance.*—A mortgage, made by an insolvent debtor to secure a valid claim, is not invalid because it was executed while a suit was pending by another creditor against the mortgagor for the collection of a debt, and because it was made to give the mortgagee a preference over such other creditor. *Ib.*
3. *Same.—Consideration.*—Where a mortgage is executed to secure pre-existing notes, no consideration other than the notes is necessary to support the mortgage. *Ib.*
4. *Misdescription.—Assignment of Record.*—The effect and validity of an assignment of record of a mortgage are not affected by the fact of an error in the record in respect to the description of the premises. *Bilsland v. McManomy*, 139
5. *Promissory Note Annexed.—Evidence.*—A mortgage executed to secure a note attached to it is binding though the note is not signed; and there is no error in allowing the note to be read in evidence, it being a part of the mortgage. *McFadden v. State, ex rel.*, 558

MUNICIPAL CORPORATION.

See CITY; TOWN.

MURDER.

See CRIMINAL LAW, 19, 24 to 27.

MUTUAL BENEFIT SOCIETY.

See CORPORATIONS, 1 to 3.

NAME.

See DEED, 1; JUDGMENT, 1, 2, 6.

NEGLIGENCE.

See PROMISSORY NOTE, 14.

1. *Verdict.—Special Findings.—Contributory Negligence.*—In a suit for negligently placing a steam engine in a street, whereby the plaintiff's team was frightened, and he was injured, the jury found a general verdict for the plaintiff, and, in answer to special questions submitted, that both of plaintiff's horses had previously run off; that the engine was calculated to scare a team not disposed to be frightened; that the plaintiff saw the engine in time to avoid danger, but did not apprehend any.
Held, that the facts specially found did not show contributory negligence on the part of the plaintiff, and were not inconsistent with the general verdict, and that judgment for the defendant thereon was erroneous.
Turner v. Buchanan, 147
2. *Animal.—Stallion.—Evidence.*—Where one assuming to own a stallion contracts for his service, and by negligent management the mare is injured, he is liable, and proof that he was really the owner of the stallion is not essential.
Grovescock v. Hall, 202
3. *Master and Servant.—Negligence.—Contract.—Evidence.—Representations.*—An express contract is not essential to create the relation of master and servant; it may be implied from circumstances; so that the master will be liable for the negligence of the servant, though in fact the relation did not exist, as where he induces the belief, and thereby leads another to act upon it to his injury.
Ib.
4. *Injury from Toy Pistol.—Pleading.—Instructions.—Variance.—Evidence.*—The complaint alleged that the defendant sold to two sons of the plaintiff, aged ten and twelve years, cartridges loaded with powder and ball, for use in a toy pistol, and instructed the boys in their use, well knowing the dangerous character thereof, and that they were too young to be trusted with such articles; that the boys left the toy pistol loaded with one of the cartridges on the floor of their home, where a younger brother, aged six years, picked it up and discharged it, the ball inflicting a wound on one of the other boys from which he died; that the plaintiff expended large sums in an endeavor to cure the wounded boy, lost his services and society, etc.
Held, that the complaint was good on demurrer.
Held, also, that the sale of the cartridges, being in violation of the criminal law, was of itself an act of negligence by the defendant, and the court might properly so instruct as a conclusion of law.
Held, also, that if the evidence disclosed that the sale was made to one instead of both the lads as alleged, the variance was immaterial.
Binsford v. Johnston, 426
5. *Same.—Intervening Agency.—Remote Damages.*—A person who places in the hands of a child an article of a dangerous character and one likely to do injury to the child itself or others, is guilty of an actionable wrong; and, where injury results, the fact that some agency intervenes between the original wrong and the injury does not preclude a recovery if the injury was the natural or probable result of the original wrong.
Ib.
6. *Same.—Sale of Dangerous Explosives.*—One who sells dangerous explosives to a child, knowing that they are to be used in such a manner as to put in jeopardy the lives of others, must be taken to contemplate the probable consequences of his wrongful act, and a probable consequence of such sale is that the buyers or their associates will be injured thereby.
Ib.
7. *Railroad.—Highway Crossings.*—A railroad company is entitled to precedence at highway crossings, on condition that it shall give reasonable and

- timely warning of the approach of its trains, and a failure to give such warning is negligence. *Indianapolis, etc., R. R. Co. v. McLin, 435*
8. *Same.—Warning Signal at Railroad Crossing.*—The obligations of railroads and travellers on highways at crossings are mutual, the same degree of care being required of each, and the right of precedence belonging to the railroad does not relieve it of the duty to give proper warning of its approaching trains, nor to use reasonable care to avoid collision. *Ib.*
 9. *Same.—Excessive Damages.—Verdict.*—Where, without fault, the plaintiff's son, aged sixteen years, is seriously injured by the negligent management of a railroad train, so as to be unconscious for a time and disabled for some weeks, a verdict for \$530 damages will not be held excessive. *Ib.*
 10. *Complaint.—Railroad Crossing.—Highway.*—A complaint against a railway company for injury to the plaintiff at a highway crossing, which avers that the defendant negligently caused its trains of cars to pass the crossing at unusual speed, and negligently omitted to give any timely signal of its approach by bell or whistle at a proper distance, by reason whereof, etc., is sufficiently specific as to the defendant's negligence. *Pittsburgh, etc., R. W. Co. v. Martin, 476*
 11. *Same.—Instruction.*—An instruction, that a failure of a railway company to sound the whistle at least eighty rods before reaching a highway crossing (the act of 1879, Acts 1879, p. 173, being in force) was negligence, and if by reason thereof the plaintiff was injured, without negligence on his part, the verdict should be for the plaintiff, was held correct. *Ib.*
 12. *Same.—Contributory Negligence.*—While the statute of 1879 was in force, a violation of it was negligence; and where the evidence showed this, an instruction, that if there were obstacles to prevent the seeing of an approaching train until the plaintiff got near the railroad, it was his duty to stop before reaching it, and look and satisfy himself that no train was approaching, and if he did not, but by so doing he could have seen the train, he was negligent, and could not recover, was properly refused. *Ib.*
 13. *Question of Fact.—Evidence.—Supreme Court.*—In an action for an injury alleged to have been occasioned by the negligence of the defendant's servants and employees, the fact of such negligence and whether any fault of the plaintiff contributed to the injury, are questions for the jury, and where the evidence, in such case, though conflicting, tends to support the verdict, the Supreme Court will not disturb it. *Evansville, etc., R. W. Co. v. Harrington, 534*

NEW TRIAL.

- See ACTION TO QUIET TITLE, 1; ASSIGNMENT OF ERROR, 2; BILL OF EXCEPTIONS, 4; CRIMINAL LAW, 3; PRACTICE, 8, 11, 16, 25; SUPREME COURT, 4, 12.
1. *Evidence.—Verdict.*—Where there is no evidence tending to sustain the verdict of a jury, a new trial ought to be granted. *State v. Mills, 126*
 2. *Motion for.—Evidence.—Objection to.—Waiver.—Practice.*—No objection to the admission of evidence, which was not suggested when the evidence was offered, can be made available as a cause for a new trial, either in the court below or on appeal, and the statement of such objection in the motion for a new trial constitutes a waiver of other objections not stated in the motion, although properly suggested to the court when the evidence was offered. *Hays v. City of Vincennes, 178*
 3. *Motion for.*—The motion for a new trial can not on appeal be regarded as

evidence of the facts stated therein, although the motion itself becomes a part of record, without bill of exceptions. *O'Donald v. Constant*, 212

4. *Surprise*.—A motion for a new trial, based upon affidavits showing surprise by the adversary's evidence, and a belief that upon another trial proof can be procured to overthrow such evidence, should not be granted, unless it appear that such countervailing proof could not have been obtained at the time, or by a short delay, of the trial, and that delay for that purpose had been requested. *State, ex rel., v. Bottorff*, 538

NOTICE.

See COVENANTS; CRIMINAL LAW, 4; DRAINAGE, 5; MECHANIC'S LIEN, 2; PLEDGE, 1; PRINCIPAL AND SURETY; PROMISSORY NOTE, 9; SHERIFF'S SALE, 11, 13; VENDOR AND PURCHASER, 3, 4.

1. *Unrecorded Defeasance*.—An unrecorded defeasance is not notice to subsequent purchasers. *Hays v. Wistach*, 13
2. *Possession*.—The continued possession by a judgment defendant, of lands sold on execution against him, is not notice to the judgment plaintiff, or his assignees, that the right of possession is claimed or held in any other character than that existing at the time of the sale. *Id.*

OPEN AND CLOSE.

See LIQUOR LAW, 2.

OUSTER.

See COVENANTS.

OWNERSHIP.

See EVIDENCE, 1; HUSBAND AND WIFE, 3, 4; LANDLORD AND TENANT.

PARAMOUNT TITLE.

See COVENANTS.

PAROL TRUST.

See FRAUDULENT CONVEYANCE, 1.

PARTIES.

See COSTS; CORPORATIONS, 5; HUSBAND AND WIFE, 1; PLEADING, 4, 5; PRACTICE, 14; SUPREME COURT, 20; WITNESS.

1. *Plaintiffs*.—*Practice*.—Parties can not join as plaintiffs whose interests are in conflict with each other. It is necessary that they should have a common interest in the relief, and that each should be interested in the relief sought by the other. *Martin v. Davis*, 38
2. *Same*.—*Demurrer*.—*Misjoinder of Parties*.—A misjoinder of plaintiffs is reached by a demurrer to the complaint for want of sufficient facts. *Id.*

PARTITION.

See WITNESS.

1. *Wife's Inchoate Interest in Real Estate Sold on Execution*.—*Complaint*.—*Statute Construed*.—In an action for partition, under the act of March 11th, 1875 (R. S. 1881, sections 2508, 2509), by the wife of the judgment debtor, the complaint must show that the judgment was rendered subsequent to the taking effect of the act. *Martin v. Prather*, 557
2. *Pleading*.—*Fee Simple*.—An allegation that petitioners for partition are the owners in fee of the land means that they are the owners in fee simple. *McMahan v. Newcomer*, 565
3. *Same*.—*Title*.—In a proceeding for partition, the question of title may be put in issue and determined. *Id.*

PARTNERSHIP.

See SHERIFF'S SALE, 6.

Practice of Law.—Construction of Contract.—Where it appeared that one L. had entered into a written contract with the law firm of J. & J., wherein they agreed to attend faithfully and skilfully to such legal business as L., by his acquaintance and popularity, and by the use of their names, could get up and turn into their hands, and to charge for such business fair prices, and to collect and divide the fees therefor, one-third to L., and two-thirds to J. & J.

Held, that J. & J. and L. did not, under the contract, become co-partners in the general practice of the law, but only in such legal business as L. might get up and turn over to J. & J. *Heshion v. Julian*, 576

PAYMENT.

See CONTRACT, 5; GUARDIAN AND WARD, 1; MECHANICS' LIEN, 3, 4; MORTGAGE, 1; REDEMPTION; SHERIFF'S SALE, 5; STATUTE OF LIMITATIONS, 2.

PERFORMANCE.

See CONTRACT, 4, 5.

PERSONAL PROPERTY.

See EVIDENCE, 1; FRAUDULENT CONVEYANCE, 3, 4; HUSBAND AND WIFE, 3, 4; MARRIED WOMAN, 7; REPLEVIN, 1; SHERIFF'S SALE, 8; STATUTE OF LIMITATIONS, 2; TAXES, 1.

PLEADING.

See ACTION TO QUIET TITLE, 2 to 6; CITY, 2; CORPORATIONS, 3, 6; COUNTER-CLAIM; CRIMINAL LAW, 1, 6, 7, 10, 14, 15, 22; DECEDENTS' ESTATES, 4, 5; DRAINAGE, 3, 4, 8; DRAINING ASSOCIATION; FRAUDULENT CONVEYANCE, 1; GUARDIAN AND WARD, 2; HUSBAND AND WIFE, 1, 2; JUDGMENT, 2; MARRIED WOMAN, 1, 8; MECHANIC'S LIEN, 3, 4; NEGLIGENCE, 4, 10; PARTITION; PRACTICE, 1 to 3, 9, 12, 13, 14, 19, 20, 22 to 24; PROMISSORY NOTE, 1, 12, 13; RAILROAD, 1, 2; REAL ESTATE, ACTION TO RECOVER; REDEMPTION, 1; REPLEVIN, 5; REVIEW OF JUDGMENT; SHERIFF'S BOND; SHERIFF'S SALE, 11; SUPREME COURT, 7, 19, 21, 24; TAXES; TOWN, 1; VENDOR AND PURCHASER, 1, 5; VERDICT, 9.

1. *Demurrer.*—An argumentative pleading will not be held bad on demurrer. The remedy is by motion to make more specific. *Vance v. Schroyer*, 114
2. *Reply.*—A bad reply is a sufficient reply to a bad answer. *State, ex rel., v. Mills*, 126
3. *Mortgage.*—A complaint which seeks merely to foreclose a mortgage need not exhibit the notes secured by the mortgage. *Sperry v. Dickinson*, 132
4. *Joint Plaintiffs must have Joint Cause of Action.—Injunction.—Judgment.*—A complaint must show a joint cause of action in favor of all the plaintiffs; and parties having separate causes of action, though they seek the same relief, as a rule, can not join in one complaint, and this rule applies to an action to enjoin the enforcement of a judgment against two or more, who each have separate grounds for the injunction, of such character as not to be available for each and all of the judgment defendants. *Bilstand v. McManomy*, 139
5. *Demurrer by Two or More.—Practice.*—Where two or more join in a demurrer, it must be overruled if the pleading to which it is addressed is good as to any one of the demurring parties. *Wilcox v. Moudy*, 219
6. *Complaint.*—A complaint showing a right to some relief is sufficient on demurrer. *Ib.*

7. *Practice.—Demurrer.*—A pleading which shows that the party is entitled to some relief, though not to all the relief prayed, is sufficient on demurrer. *Boyd v. Olvey, 294*
8. *Same.—Inferences from Facts.—Conclusions.*—Where facts are properly pleaded, courts will draw the proper inferences; but the statement of the pleader's conclusions neither adds to nor detracts from the facts pleaded. *Ib.*
9. *Same.—Exhibits.—Written Instrument.*—It is only where a pleading is founded upon a written instrument that it is necessary to set out the instrument. *Ib.*
10. *Consideration of Agreement.—Bill of Particulars.*—Under section 363, R. S. 1881, in a proper case, the defendant is entitled to a bill of particulars of the plaintiff's cause of action, and it would be error to overrule his motion therefor; but where the complaint counts upon an agreement, and states the consideration of such agreement to have been divers sums of money, pieces of property and accounts, the defendant is not entitled to a bill of particulars of such moneys, property and accounts. *Crane v. Crane, 459*
11. *Contract.—Consideration.*—A pleading, based upon an agreement which does not express or import a consideration, should allege what the consideration was. *Nichols v. Nowling, 488*
12. *Averments of Title.*—Where a party specifically describes his title, the specific will control the general averments. *McMahan v. Newcomer, 565*
13. *Same.—Construction of Will.—Exhibit.*—Where a party seeks a construction of a will, he must make it a part of his pleading, by filing it as an exhibit, or otherwise. *Ib.*

PLEDGE.

1. *Sale of.—Demand.—Notice.—Mechanic's Lien.—Statute Construed.*—Upon default in the payment of a debt, an article pledged may be sold at public auction, after demand of payment, and upon notice to the pledgor of the time and place of sale. The act concerning liens of mechanics, etc., approved May 20th, 1852, R. S. 1881, section 5304, is not applicable to pledges. *Rosenzweig v. Fraser, 342*
2. *Same.—Conversion.—Measure of Damages.*—If the pledgee make an unlawful sale, it constitutes a conversion; and the measure of damages is the value of the article, less the amount for which it was pledged. *Ib.*

POSSESSION.

See HUSBAND AND WIFE, 3, 4; NOTICE, 2; REAL ESTATE, ACTION TO RECOVER; REPLEVIN, 1, 3, 8; SHERIFF'S SALE, 13; VENDOR AND PURCHASER, 2 to 4.

PRACTICE.

See ACTION TO QUIET TITLE, 2, 4, 5; ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CHANGE OF VENUE; CONTEMPTS; CONTINUANCE; COSTS; CRIMINAL LAW, 1 to 5, 10, 15, 16, 21, 23 to 26; DECEDENTS' ESTATES, 5; DEMURRER TO EVIDENCE; DRAINAGE, 2; ESTOPPEL, 2; INSTRUCTIONS; JUDGMENT, 1, 3, 5, 6; LIQUOR LAW, 1, 2; MANDAMUS, 1, 2; MARRIED WOMAN, 5; MASTER COMMISSIONER; MECHANICS' LIEN, 3, 4; NEW TRIAL; PARTIES; PLEADING, 1, 3 to 5, 7, 10, 12, 13; PROMISSORY NOTE, 1; RECEIVER; REPLEVIN, 5, 6; SHERIFF'S SALE, 11; SPECIAL FINDING; SUPREME COURT; VERDICT, 1, 9.

1. *Pleading.*—A pleading having been struck out of the record can be brought back only by a bill of exceptions, or by order of court. *State, ex rel., v. Krug, 58*
2. *Demurrer to Answer.*—A demurrer to an answer tests the sufficiency of the complaint. *Ib.*

3. *Judgment on Defective Complaint.*—Where the complaint fails to show a cause of action, and a judgment is rendered against the plaintiff, he can not complain thereof on account of error in ruling upon his demurrer to an answer. *Ib.*
4. *Interrogatories by Juror to Witness.*—Where no objection is made to interrogatories propounded to a witness by a juror, nor any exception reserved, no question is presented for the decision of the Supreme Court as to the admissibility of such interrogatories. *McQueen v. State, 72*
5. *Evidence.*—After a pleading has been stricken out, there is no error in rejecting evidence which would only have been admissible under it. *Stephenson v. Ballard, 87*
6. *Evidence.—Prima Facie Case.*—When the party having the burden of the issue has given evidence making a *prima facie* case, he is entitled to a finding unless it be met and overcome by evidence given by the other party. *Dick v. Hill, 92*
7. *Bond for Costs.—Bill of Exceptions.*—To bring before the Supreme Court the action of the court below in refusing to require a plaintiff to give security for costs, the motion and affidavit therefor must be brought into the record by bill of exceptions. *Hadley v. Hadley, 95*
8. *New Trial.—Evidence.*—Where the finding is joint against two defendants, the evidence being insufficient as to one, both are entitled to a new trial. *Sperdy v. Dickinson, 132*
9. *Pleading.—Harmless Error.*—When the general denial is in, there is no error in striking out another paragraph which is merely its equivalent. *Hervey v. Parry, 263*
10. *Evidence Admitted Out of Order.*—It is in the discretion of the court to admit evidence out of its regular order. *Nye v. Lowry, 316*
11. *Motion for New Trial.*—It is not a good cause for a new trial, that the judgment is not sustained by the evidence, or is contrary to law. *Rosenzweig v. Frazer, 342*
12. *Pleading.—Proof.*—When there are several paragraphs of answer, some in confession and others in denial, the plaintiff can not treat those in confession as dispensing with the proof of facts put in issue by the paragraphs in denial. *Smelser v. Wayne, etc., T. P. Co., 417*
13. *Additional Pleadings.—Discretion of Trial Court.*—The right of a party to file additional pleadings after the issues have been closed is not absolute, but is controlled by the discretion of the trial court. *Hoffman v. Rothenberger, 474*
14. *Amendment.—Parties.*—A complaint may be amended before answer and without leave, by substituting a different person as plaintiff. *Pittsburgh, etc., R. W. Co. v. Martin, 476*
15. *Argument of Counsel.—Discretion of Court.*—After the close of the evidence, one of the plaintiff's counsel addressed the jury, whereupon the defendant's counsel being, on inquiry, told by the associate counsel for the plaintiff, that he did not wish to say anything in the opening, declined to make any answer, whereupon said associate, over the defendant's objection, also addressed the jury, and then the defendant's counsel declined to argue.
Held, that the discretion of the court was not abused, and there was no error. *Ib.*
16. *Same.—Improper Remarks.—New Trial.*—Improper remarks of counsel in argument, to which no objection is made at the time, will not warrant a new trial. *Ib.*
17. *Instructions.*—When the court has given an instruction, substantially such as a party asks, it may refuse the latter. *Ib.*

18. *Time for Filing Bill.*—An exception must be taken at the time of a decision and reduced to writing during the term, unless an order is made during such term granting further time to file a bill, and time given until a day named does not include that day. *Eshelman v. Snyder*, 498
19. *Same.—Pleading.—Complaint Cured by Verdict.*—Under a motion in arrest, a complaint which shows a cause of action, though defectively stated, will be deemed good after verdict. *Id.*
20. *Amendment of Pleading.—Transcript.*—An amended pleading should be refiled and a docket entry made of the fact, and, in making a transcript, the pleading as amended should be set out in connection with that entry. *Id.*
21. *Objections.—Evidence.—Bill of Exceptions.*—A party objecting to offered evidence must state the grounds of his objection at the time, and embody them in his bill of exceptions. *Cox v. Rash*, 519
22. *Pleading.—Uncertainty.*—Uncertainty in a pleading is not reached by demurrer, but by motion. *Marquess v. LaBar*, 550
23. *Harmless Error.*—Where a cause has been tried upon agreement to admit all defences without pleading them, the action of the court in striking out a paragraph of answer is not available error. *Board, etc., v. Miller*, 572
24. *Debt Due and Unpaid.—Defective Complaint Cured by Verdict.*—Where the complaint alleges that, on a certain day, the defendant became and was indebted to the plaintiff in a certain sum, which he then promised to pay, but had since failed and wholly refused so to do, and no demurrer is filed to the complaint, and its sufficiency is questioned for the first time by an assignment of error, it will be held that the defects in the complaint were cured by the verdict. *Heshion v. Julian*, 576
25. *Motion for New Trial.—Instruction.—Record.*—An instruction asked and refused does not become a part of the record of the cause by being copied in the motion for a new trial. *Baird v. Glück*, 602
26. *Evidence.—Harmless Error.*—It is harmless error to permit a party to duplicate a portion of his record evidence. *Adams v. Lee*, 587

PREFERENCE OF CREDITOR.

See FRAUDULENT CONVEYANCE, 3, 4; HUSBAND AND WIFE, 5; MORTGAGE, 2.

PRESCRIPTION.

See TOWN, 2.

PRESUMPTION.

See BILL OF EXCEPTIONS, 2; CHANGE OF VENUE; CRIMINAL LAW, 2, 8, 20; HUSBAND AND WIFE, 4; JUDGMENT, 3, 4; PROMISSORY NOTE, 10; SHERIFF'S SALE, 18; SLANDER, 2; SPECIAL FINDING, 1; SUPREME COURT, 7.

PRINCIPAL AND SURETY.

See CONTRACT, 1; GUARDIAN'S BOND; PROMISSORY NOTE, 2, 7; SHERIFF'S SALE, 8 to 10; SUBROGATION, 1.

1. *Extension of Time.—Notice.*—An extension of time by agreement with the principal debtor does not discharge a surety, unless the suretyship be known to the holder of the obligation. *Lamson v. Nat'l Bank, etc.*, 21
2. *Same.—Burden of Proof.*—The surety who alleges an extension of time, without his consent, must allege and prove that the holder of the obligation had notice of the suretyship. *Id.*

PROMISSORY NOTE.

See CONTRACT, 5; GUARDIAN AND WARD, 1; MARRIED WOMAN, 2 to 4; MORTGAGE, 3, 5; REVIEW OF JUDGMENT, 2; VENDOR AND PURCHASER, 5.

1. *Evidence.—Execution of Lost Note.—General Denial Not Verified.—Non-Payment.*—On trial of an action upon a promissory note alleged to have been lost, due and unpaid, the plaintiff, to sustain the issue formed by the general denial, not verified, is not required to prove the execution of the note, or his allegation that it is unpaid. *Pattison v. Shaw*, 32
2. *Alteration.—Surety.—Discharge.*—A material alteration in a note made after it has been signed by the surety, and before delivery, without his knowledge or consent, invalidates the note as to him, and the changing of the time of payment from "one day" to "one year" after date is such alteration as will discharge the surety. *Stayner v. Joice*, 35
3. *Failure of Consideration.—Demand.*—Where a note is given solely for copies of certain secret recipes and chemical formula, with instructions in their use, to be furnished by the payee, and the latter fails to furnish the copies or give the instructions, the maker being ready to receive them, a demand for them is unnecessary, and there is a failure of consideration of the note. *Booth v. Fitzer*, 66
4. *Insolvent Maker.—Evidence.—Exemption.—Recovery Against Assignor.*—In an action against the assignor of a promissory note not payable in bank, the plaintiff is entitled to recover upon proof that the maker has no property not exempt from sale on execution. *Dick v. Hill*, 92
5. *Interest.—Erasure.—Review of Judgment.*—A note payable five years after date had printed therein "with ten per cent. interest after maturity;" "with ten per" had been erased and on the line above was written "payable at six per cent. interest."
Held, that only the rate of interest was changed and not the time interest should begin, viz., after maturity.
Held, also, in an action to review a judgment taken upon the note, with interest from date, that such a judgment was erroneous, and that a complaint to review for such cause was sufficient. *Stayner v. Knowler*, 157
6. *Consideration.—Evidence.—Advancement.*—When a father gives money to his daughter, intended as an advancement, and at the same time takes the promissory note of her husband for the amount, for the purpose of evidencing the advancement, parol evidence is admissible, in a suit to subject her real estate, in which said money was invested, to the payment of her husband's debts, to show the facts. The effect is to show that the note was given without consideration.
Bragg v. Stanford, 234
7. *Principal and Surety.—Release of Surety.—Lien.—Married Woman.*—It is the duty of the payee of a note upon which there is a surety to hold all securities he has from the principal of the note for the benefit of the surety; and if he releases a lien upon property of greater value than the amount of the note, such release discharges the surety, though the principal be a married woman and not bound by the note.
Sample v. Cochran, 260
8. *Commercial Paper.—Endorser and Endorsee.—Attorney's Fees.—Set-Off.*—A promissory note, payable at a bank in this State, is commercial paper, though it contain an agreement to pay attorney's fees; and a set-off against the payee can not be pleaded by the maker to a suit upon it by an endorsee without notice, for value and before maturity.
Proctor v. Baldwin, 370
9. *Same.—Collateral Security.—Bank Director.—Endorsement.—Consideration.—Notice.—Injunction.—Bona Fide Purchaser.*—Suit against the maker by a second bona fide endorsee of commercial paper, taken before

maturity, who paid part of the price of the paper in cash, and for the balance agreed to cancel a debt held by him against his immediate endorser, which was never formally done. The payee had delivered the note without endorsement, as collateral security, to a bank for a small loan; then he endorsed it to another, who took it in good faith, agreeing to pay this loan, after which the paper was returned to its place in the bank; and afterwards he endorsed it, without the bank's consent, to the plaintiff, who, though a director of the bank, had no knowledge that the bank had any right to the paper. After the first endorsement, but without knowledge of it, the maker purchased a large note against the payee (who was and continued to be insolvent), upon which he at once began suit, getting a temporary injunction against negotiating the note of the defendant, pending which and with knowledge of it, the first endorsee made the endorsement and sale to the plaintiff, who knew nothing of the injunction. After this, the maker's suit against the payee proceeded to judgment and a perpetual injunction.

Held, that the first endorsee was protected against defences, and that the plaintiff could recover the full amount of the paper sued for. *Ib.*

10. *Presumption*.—A bank director is presumed to have knowledge of the securities of the bank, but this presumption may be overcome by proof.

Semble, that if one, in consideration of the endorsement of commercial paper before maturity, agree to satisfy a note held by him against his endorser, he is entitled to protection as a *bona fide* purchaser, though he had not, in fact, cancelled or delivered up the note of his endorser. *Ib.*

11. *Assignee and Assignor*.—*Due Diligence*.—Where the maker of a promissory note becomes a non-resident of this State, after the assignment of the note and before its maturity, due diligence does not require the assignee to pursue the maker out of the State, before he can maintain an action against his immediate or remote assignor. But the rule is different where the maker of the note is a non-resident of this State, at the time of the assignment; for, in such case, the assignee must pursue the maker with due diligence, or show that such diligence would be unavailing, in order to maintain his action against the assignor.

Stevens v. Alexander, 407

12. *Complaint*.—*Evidence*.—*Variance*.—*Endorsement*.—*Consideration*.—*Title*.—A complaint upon a promissory note alleged to have been made to A., and by him assigned by endorsement to the plaintiff, is not supported by proof that A. was the agent of the plaintiff and as such took the note in his own name for the plaintiff upon a consideration moving from the latter. *Smelser v. Wayne, etc., T. P. Co.*, 417

13. *Pleading*.—*Exhibits*.—Where, in a complaint on a promissory note, it is averred that the note "is filed herewith," and in the transcript there appears next to the complaint a copy of a note corresponding to that declared on, it is a sufficient identification of the exhibit. A separate file-mark upon the exhibit is not necessary when it is attached to the complaint. *Whitworth v. Malcomb*, 454

14. *Payable to Order of Maker*.—*Forged Endorsement*.—*Negligence*.—*Burden of Issue*.—Where one is sued as the maker and endorser of a promissory note payable to his own order, and he answers, under oath, admitting that he made the note but denying that he had ever endorsed or transferred the note, as alleged, and averring that the endorsement is a forgery, the burthen of the issue is on the plaintiffs to show by a preponderance of the evidence, the defendant's endorsement of the note; for, if the endorsement is a forgery, the defendant is not guilty of negligence in the negotiation of the note, and the plaintiffs are not innocent holders thereof for value. *Baldwin v. Shuter*, 560

PUBLIC POLICY.

See JUDICIAL SALE, 1; MECHANIC'S LIEN, 5.

PURDUE UNIVERSITY.

See SCHOOL LAW.

QUESTION OF FACT.

See CITY, 6; CRIMINAL LAW, 27; LIQUOR LAW, 4; NEGLIGENCE, 13.

QUIETING TITLE.

See ACTION TO QUIET TITLE; MARRIED WOMAN, 1.

RAILROAD.

See MANDAMUS, 3; NEGLIGENCE, 7 to 13; TRESPASS, 2.

1. *Killing Stock.—Venue.—Evidence.*—In an action, under the statute, against a railroad company for killing stock, the plaintiff must allege and prove the county in which the stock was killed; but it is not necessary that the proof be made by direct or positive testimony; it will be sufficient if facts are proved from which it can be reasonably inferred.
Louisville, etc., R. W. Co. v. Kiouss, 357
2. *Same.—Complaint.—Duty to Fence.*—In such action it is not necessary to allege in the complaint that the company was bound to fence the railroad at the place where the stock was killed. If not obliged to fence where the injury occurred, it may be shown as matter of defence.
Ib.
3. *Stock Killed by Lessee.—Evidence.—Variance.*—Complaint against a railroad company to recover the value of a mare of the plaintiff, alleged to have been killed by the defendant, by running its locomotives and cars upon the mare. The evidence disclosed that another railroad company, exclusively operating the road as lessee of the defendant, with its own locomotives and cars, committed the injury.
Held, that the variance was fatal. *Cincinnati, etc., R. R. Co. v. Wood, 593*
4. *Same.—Fencing.*—A railroad company is not required by the statute—R. S. 1881, section 4031—to fence its road at places where a fence would interfere with its free use of its property, or with the free use by individuals of their property, or with the rights of the public. *Ib.*
5. *Same.—Evidence.—Conflict of Witnesses.*—Witnesses, mere casual observers, not engaged in business on a railroad, nor connected with it, nor engaged with those operating it, but pursuing other occupations, testified to a state of facts tending to show that, at a point in question, a fence would not interfere with its free use. Other witnesses, assisting in the business of the road at that point, so that they could not be mistaken, and having peculiar qualifications for knowing and judging of the matter, testified positively to a contrary state of facts, showing that a fence there would be a serious interference with the business of the road, and endanger employees of the road.
Held, that this was not really a conflict of evidence, but that the class of witnesses first referred to, should be understood as testifying only that so far as they had observed the facts were as stated by them. *Ib.*

RATIFICATION.

See CONTRACT, 8.

REAL ESTATE.

See ACTION TO QUIET TITLE; BANKRUPTCY; CONVEYANCE; COVENANTS; DEED; DESCENTS; DRAINAGE, 7; EMINENT DOMAIN; FRAUDULENT CONVEYANCE, 1, 2; GRAVEL ROAD, 2; GUARDIAN AND WARD, 1; HUSBAND AND WIFE, 1, 2; JUDICIAL SALE; LANDLORD AND TENANT;

MARRIED WOMAN, 1 to 7; MECHANIC'S LIEN, 1, 3; MORTGAGE; NOTICE, 2; PARTITION; REAL ESTATE, ACTION TO RECOVER; REDEMPTION; SHERIFF'S SALE; SUBROGATION, 2, 3; TAXES; TENANT FOR LIFE; TRUST AND TRUSTEE; VENDOR AND PURCHASER; WILL.

REAL ESTATE, ACTION TO QUIET TITLE.

See ACTION TO QUIET TITLE; MARRIED WOMAN, 1.

REAL ESTATE, ACTION TO RECOVER.

See COVENANTS, 2; JUDICIAL SALE, 4; MARRIED WOMAN, 1; SHERIFF'S SALE, 1, 2; VERDICT, 9.

1. *Complaint.—Title.—Right to Possession.*—It is not necessary, in an action for the recovery of real estate, for the plaintiff to aver in his complaint that he is the owner in fee of the land; any one having a subsisting interest therein and a right to the possession thereof may maintain an action against the tenant in possession. And where, in such action, the complaint avers that a court of competent jurisdiction, in a suit in which the plaintiff and defendant were parties, adjudged the plaintiff to be the owner and entitled to the possession of the premises, and that the defendant unjustly withheld from him the possession thereof; that, in pursuance of a writ of restitution issued on such judgment, the plaintiff was put in possession of the premises; but that afterwards the defendant forcibly and without right entered and took possession thereof, it shows that the plaintiff had a subsisting interest in the real estate and was entitled to the possession, and is sufficient on demurrer. *Vance v. Schroyer, 114*
2. *Complaint.—Descriptio Personæ.—Demurrer.—Administrator.*—In the caption of a complaint in ejectment, giving the title of the cause, the plaintiff was described as "administrator of the estate of R., deceased," but it was averred in the body of it that the plaintiff was the owner and entitled to possession of the land, without any statement that he claimed as administrator, or that the estate of the intestate had any interest in it. *Held*, that the words in the caption must be regarded as *descriptio personæ*, and that a demurrer to the complaint did not present any question as to the right of the administrator to recover possession of lands of the estate. *Downs v. Opp, 166*
3. *Real Estate.—Description.—National Surveys.—County Boundaries.—Judicial Knowledge.*—Courts take judicial knowledge of the National surveys and of the territorial boundaries of counties, and where a full and accurate description of land is given, it can be located in the proper county without difficulty. *Wilcox v. Moudy, 219*
4. *Same.—Complaint.—Title.—Venue.—Jurisdiction.*—Where the venue is properly laid in the title of a complaint to recover real estate, filed in the circuit court, want of jurisdiction can be shown only by answer. *Ib.*
5. *Evidence.—Claimant's Title.*—One who seeks to recover real estate must recover on the strength of his own title, and not on the weakness of his adversary's. *Cox v. Rash, 519*

RECEIVER.

1. *Appointment.*—A receiver may be appointed, if the facts justify it, at any time while a suit is pending, and after appeal to the Supreme Court from a final judgment, the suit is still pending, so that the lower court may, on application, make such appointment. *Brinkman v. Rüttinger, 358*
2. *Same.—Mortgage.—Rents.—Taxes.*—There was a foreclosure of a mortgage on lands for interest due, the principal debt not having matured, and an appeal to the Supreme Court by the administratrix without bond (the mortgagor having died). Pending this appeal the mort-

gagee applied to the lower court for a receiver of the mortgaged premises, showing the foregoing facts, and that the mortgagor died insolvent, having no other property; that the land was worth less than the mortgage debt, and the annual rents less than the interest; that the heir was appropriating the rents to her own use, and not paying the taxes, and that a portion had been sold for delinquent taxes, and that there was a further delinquency of taxes in the sum of \$520.

Held, that the case was a proper one for the appointment of a receiver, to take the rents pending the appeal, and apply them as the court should direct. *Ib.*

RECORD.

See BILL OF EXCEPTIONS; CHANGE OF VENUE; CITY, 2; EVIDENCE, 2; INSTRUCTIONS, 3; JUDGMENT, 3, 5; MASTER COMMISSIONER; MORTGAGE, 4; PRACTICE, 25; SUPREME COURT, 19.

REDEMPTION.

See ACTION TO QUIET TITLE, 6; HUSBAND AND WIFE, 1; JUDICIAL SALE, 4; MARRIED WOMAN, 5; SHERIFF'S SALE, 5, 6, 12.

1. *Payment to Clerk of Bank Notes.—Complaint.*—The holder of a sheriff's certificate of purchase of real estate sold on execution can not defeat a redemption in a case where the clerk receives in good faith the amount necessary to redeem in bank notes, deposits them in bank and has continuously, from the time of the receipt, lawful money ready for the holder of the certificate, which he is willing to deliver, and does tender to him, and where such facts appear in the complaint, in an action to set aside the sheriff's deed executed after such redemption and quiet title to the land, the complaint is sufficient on demurrer. *Boyd v. Olvey, 294*
2. *Same.—Clerk may require Legal Tender Money in Payment of Redemption of Land Sold on Execution.—Waiver.*—A clerk of the circuit court may require gold or silver coin or notes made by law a legal tender, in payment of the amount necessary to redeem land sold on execution, but he may receive payment in its equivalent, and, where he does so, and holds himself in readiness to pay in legal tender, the holder of the sheriff's certificate can not, for his failure to require payment in legal tender, defeat the redemption. *Ib.*

REHEARING.

See SUPREME COURT, 17.

RELEASE OF SURETY.

See CONTRACT, 1; PRINCIPAL AND SURETY; PROMISSORY NOTE, 2, 7.

REMAINDER-MAN.

See DECEDENTS' ESTATES, 2; TENANT FOR LIFE.

RENT.

See HUSBAND AND WIFE, 1; LANDLORD AND TENANT; RECEIVER, 2; SHERIFF'S SALE, 1, 2.

REPEAL OF LAWS.

See DRAINAGE, 6.

Conflict of Laws.—Construction.—The law does not favor the repeal of statutes by implication, and where two statutes are enacted upon the same subject by the Legislature at the same session, they should be construed together if possible; but, when they are irreconcilable, then the later supersedes the former, though they were both intended to take effect at the same time. *Wright v. Board, etc., 335*

REPLEVIN BAIL.

See SUBROGATION, 1.

REPLEVIN BOND.

See MARRIED WOMAN, 8; REPLEVIN, 9, 10.

REPLEVIN.

1. *Execution.—Sheriff.—Possession.—Instruction.*—Where a sheriff levies on goods of another than the defendant in the execution, and upon receiving a delivery bond from the owner (without provision therein that the debtor may sell the goods and apply the value on the execution) leaves them in his possession, the sheriff still has such constructive possession as will justify replevin under the statute, R. S. 1881, section 1266, and it is error in such case to instruct the jury that if the possession was not in the sheriff when the suit was begun the verdict should be for the defendant. *Hadley v. Hadley, 75*
2. *Same.—Fraud.*—If one combine with another to defraud the creditors of the latter, it does not result that the property of the former is subject to execution against the latter. *Ib.*
3. *Possession.—Execution.—Sheriff.—Levy.*—If a sheriff, by direction of a plaintiff, who is present, levy an execution upon goods of another than the execution defendant, the goods being present and within his control, and he leave them in the custody of the execution defendant where he found them, upon his delivery bond, without surety, the owner may, under the statute (R. S. 1881, section 1266), maintain replevin against both, though the sheriff or plaintiff personally have not actual possession of the goods at the commencement of the suit. *Hadley v. Hadley, 95*
4. *Same.—Receiptor.*—In such case, the execution defendant is a mere receiptor of the goods, and the possession is that of the sheriff. *Ib.*
5. *Judgment of Return of Property.—Pleading.*—A cross complaint or answer specially praying a return of the property to the defendant, in an action of replevin, is not necessary to entitle him to judgment for such return, the general denial being enough. *Williams v. Kessler, 183*
6. *Same.—Default.—Affidavit to Set Aside.*—The affidavit of a plaintiff in replevin to set aside a default and judgment against him rendered thereon, is insufficient if it do not show the nature of his cause of action. A general statement, that "he has a good cause of action, and believes he will recover judgment," is insufficient, and the court can not, on motion to set aside the default, take notice of the affidavit for the writ. *Ib.*
7. *Same.—Excusable Neglect.*—A railroad accident caused the loss of a day to a party *en route* to court, notwithstanding which he could have reached the place in time for trial, but for the fact that he stopped to get a necessary witness, with whom he had arranged to meet his train of the day before and go with him, and who had met that train, and by reason of the delay he was defaulted, and judgment rendered against him. *Held, that his neglect was not excusable. Ib.*
8. *Chattel Mortgage.—Possession of Property.*—The owner of personal property who executes a chattel mortgage thereon, containing a stipulation that he may retain possession thereof until the maturity of the debt, can, if the mortgagee takes possession of such property before that time, recover its possession in an action of replevin. *Niven v. Burke, 455*
9. *Replevin Bond.—Jurisdiction.—Justice of the Peace.*—Where the affidavit for a writ of replevin, before a justice of the peace, fixed a value to the property which brings the cause within the justice's jurisdiction, a replevin bond taken by him is not void, though afterwards the same

may be dismissed because it is disclosed on the trial that the value exceeds his jurisdiction. *Coverdale v. Alexander, 503*

10. *Same.—Approval.*—The issuing of a writ of replevin by a justice of the peace upon the filing of a bond is a sufficient approval of the bond. *Ib.*

REPRESENTATIONS.

See NEGLIGENCE, 3; VENDOR AND PURCHASER, 1.

RES ADJUDICATA.

See FORMER ADJUDICATION.

RESCISSION.

See FRAUDULENT CONVEYANCE, 4.

RESERVED QUESTION OF LAW.

See BILL OF EXCEPTIONS, 2.

RES GESTÆ.

See CRIMINAL LAW, 24; VENDOR AND PURCHASER, 5.

REVIEW OF JUDGMENT.

See PROMISSORY NOTE, 5.

1. *Complaint.*—A complaint to review a judgment must be tried by the record, and must disclose such error therein as would be good ground for a reversal by the Supreme Court. *Stayner v. Joice, 35*
2. *Same.—Promissory Note.—Material Alteration.—Evidence.*—A complaint for the review of a judgment, because of a material alteration of the promissory note sued on, which contains uncontradicted evidence in support of plaintiff's verified answer of *non est factum*, is sufficient on demurrer. *Ib.*

ROBBERY.

See CRIMINAL LAW, 6, 8, 9.

SALE.

See CRIMINAL LAW, 5; FRAUDULENT CONVEYANCE, 4; GUARDIAN AND WARD, 1; JUDICIAL SALE; LIQUOR LAW, 4, 5; NEGLIGENCE, 4, 6; PLEDGE; SHERIFF'S SALE; STATUTE OF LIMITATIONS, 2; SUBROGATION, 2.

SCHOOL LAW.

See SUBROGATION, 2, 3.

Purdue University.—College Secret Society.—Mandate.—The board of trustees and faculty of Purdue University can not make membership in a Greek letter fraternity or other college secret society a disqualification for admission as a student in the university, or require, as a condition of such admission, that an applicant, who may be a member of such a society, shall sign a pledge to disconnect himself from such society during his connection with the university, and admission, refused for such cause, may be enforced by mandate against the trustees and faculty. *State, ex rel., v. White, 278*

SECURITIES.

See PROMISSORY NOTE, 7, 9.

SET-OFF.

See JUDGMENT, 7, 8; PROMISSORY NOTE, 8; SUPREME COURT, 16.

Guardian.—Set-off can not be pleaded to a complaint to set aside a guardian's report. *Marquess v. LaBaw, 550*

SHERIFF.

See REPLEVIN, 1, 3; SHERIFF'S BOND; SHERIFF'S SALE.

SHERIFF'S BOND.

See SHERIFF'S SALE, 8 to 10.

1. *Complaint.—Voluntary Assignment.*—A complaint, by the assignee of an insolvent debtor, on the bond of a sheriff, for the wrongful taking of property of the debtor conveyed to him, which gives no description of the property or copy of the deed of assignment or its date, and does not show when or where it was recorded, is insufficient. *State v. Krug, 58*
2. *Same.—Title of Assignee.*—In such action the complaint need not state the particulars of the assignee's title, but if it undertakes to do so, and thereby shows want of title, it is insufficient on demurrer. *Id.*

SHERIFF'S SALE.

See ACTION TO QUIET TITLE, 6; JUDICIAL SALE; MORTGAGE, 1; NOTICE, 2; REDEMPTION.

1. *Real Estate, Action to Recover.—Mortgage.—Rents.—Agreement.—Evidence.*—Where to an absolute deed of lands there is a separate written defeasance, thus constituting a mortgage, it seems that parol evidence to show that the deed was intended to operate as a mortgage is not admissible, except in cases of fraud or mistake; and an agreement, made without the knowledge of a judgment plaintiff, between the judgment defendant and his vendee of the premises, that the vendee should assume the payment of plaintiff's claim, and allow defendant to remain in possession, and that a certain sum agreed upon between them as interest, should stand instead of rent, is not competent evidence in a suit by an assignee of the plaintiff, who was the purchaser at sheriff's sale, to recover possession from the defendant. *Hays v. Wistach, 13*
2. *Same.—Trust and Trustee.—Mesne Profits.—Demand.—Ejectment.*—After a judgment foreclosing a mortgage of real estate, and before sale thereon, the judgment defendant, by absolute deed intended to operate as a mortgage, conveyed the premises to P., who undertook to advance money to pay the mortgage debt and other debts of the judgment defendant, but of this the judgment plaintiffs had no notice. Subsequently, the land was purchased at sheriff's sale, upon the judgment, by the plaintiffs therein, and they then entered into a contract with P. for the sale of their certificate of purchase to him, receiving a sum of money in hand, and the sale to be effective upon the payment by him to them of the balance of their debt in certain instalments; and, for the purpose of carrying out this contract, the certificate was assigned to W. in trust, who had no notice of the contract between P. and the judgment defendant.
Held, that W. on receiving a sheriff's deed could maintain ejectment against the judgment debtor, and that demand of possession was not necessary.
Held, also, that mesne profits to the time of the trial could be recovered.
Held, also, that the rights of the judgment defendant against P. could not be interposed to defeat W. in a suit for possession and mesne profits. *Id.*
3. *Same.—Agreement between Execution Defendant and Third Person.*—An execution defendant in possession can not make any agreement with a third person which will impair the rights of the judgment creditor. *Id.*
4. *Same.*—An execution defendant in possession can not contest the title of the judgment creditor's assignee. *Id.*
5. *Same.—Payment of part of Judgment.—Effect of.—Redemption.*—The rule that, where money is paid in redemption of lands sold upon execution, the holder of the certificate can not take out a sheriff's deed, does

not apply to a case where a third person agrees to buy the certificate and pays part of the agreed price therefor. *Ib.*

6. *Partnership.—Mortgage.—Equity of Redemption.*—G., a member of a firm of partners, mortgaged to the firm real estate to secure a note for \$700, specified in the mortgage as being "held as a reserve fund." A receiver of the firm brought suit to foreclose, alleging that the assets of the firm were exhausted, and that its unpaid liabilities were \$5,000. Answer, that the mortgage was made to the firm to indemnify it against the failure of G. to pay his share of the liabilities of the firm; that all such liabilities are to other members of the firm; that the defendants are purchasers of the land at sheriff's sale, upon a judgment against the firm for a firm debt.
Held, that the answer was bad on demurrer, and that the sale by the sheriff was only of the equity of redemption, and did not discharge the mortgage. *Rahm v. Butterfield, 163*
7. *Same.—Execution.—Lien of Mortgage.*—A sheriff's sale on an ordinary execution of real estate owned by one of several joint judgment debtors, upon an execution against all, will not divest a mortgage lien of one of them upon the land. *Ib.*
8. *Levy of Execution on Personal Property, which is Wasted.—Judgment.—Bond.—Principal and Surety.*—A sheriff who levies upon and wastes sufficient personal property, belonging to the principal in the judgment, to satisfy the writ, and afterwards levies said writ upon and sells real estate of a surety in said judgment, does not thereby render himself liable upon his bond to the owner of such property. *Harmon v. State, 197*
9. *Same.—Satisfaction of Judgment.—Sale Thereafter does not Direct Title.*—A levy upon sufficient personal property, which is wasted, satisfies the writ, and a sale thereafter of real property upon such writ does not divest the title of the owner of the property. *Ib.*
10. *Same.—Estoppel.*—In a suit against a sheriff and the sureties upon his bond, where the plaintiff alleges the invalidity of a sale made by him, he and his sureties are not estopped to insist that such sale did not divest the plaintiff's title to such property. *Ib.*
11. *Description in Notice.—Answer.—Reply in Avoidance.*—A. assigned to B. a sheriff's certificate of the sale of land on which C. held a junior judgment lien, B. agreeing in consideration of the assignment to pay C.'s judgment. In a suit by C. to enforce payment, an answer by B. that the sale was void because of an insufficient description in the notice is avoided by a reply that under a second sale the defendant acquired a perfect title and had long been in possession of the land.
See also v. Gall, 255
12. *Redemption.—Mortgage.*—A purchaser of lands at sheriff's sale, taking a deed thereof, who afterwards takes an assignment of a certificate of sheriff's sale made to satisfy a prior mortgage, must be deemed only to have redeemed, and he holds title by virtue of his own purchase, and not by virtue of such redemption. *Westerfield v. Kimmer, 365*
13. *Same.—Trust.—Notice.—Possession.—Husband and Wife.*—Where lands are purchased at sheriff's sale, the proper title being in the husband defendant, a resulting trust in favor of the wife, of which the purchaser had no notice, can not be enforced against the latter, and her mere residence on the land, with her husband, would not be such possession as would charge him with notice. *Ib.*
14. *Sale of Real Estate of Debtor After Conveyance.*—A sheriff's sale of real estate, after it has been conveyed by the debtor to his vendee, is not invalid simply because the debtor had other real and personal property of sufficient value to satisfy the execution. *Sansberry v. Lord, 521*
15. *Same.—Right of Vendee to Have Other Property of Execution Defendant*

Exhausted.—In such case the vendee, if he requests it, is entitled to an order requiring the officer to first exhaust the property of the debtor, but the sale of the property is not invalid in the absence of such order. *Ib.*

16. *Judgment.—Justice of the Peace.—Transcript Filed More Than Ten Years After Rendition.—Sheriff's Sale of Land not Void, but Voidable Only.*—A sheriff's sale of lands under an execution issued upon a transcript of a judgment of a justice of the peace, filed more than ten years after its rendition, is not void for want of revival and leave of court, but is voidable only in a direct proceeding by the execution defendant, instituted before the sale. *Martin v. Prather, 635*
17. *Same.—Lien.—Sale.*—Although, under section 614, R. S. 1881, such a judgment may not become a lien upon the real property of the defendant, there may be a valid sale of the land to an innocent purchaser to satisfy it. *Ib.*
18. *Same.—Certificate of Justice and Affidavit of Non-Payment.—Presumption.*—It will be presumed in aid of such sale, the contrary not appearing, that the necessary certificate of the justice and affidavit of the plaintiff, or his agent, were filed before issuing the execution. *Ib.*

SIGNATURE.

See DEED, 1.

SLANDER.

1. *Evidence.—Whoredom.—General Character.—Particular Acts.—Mitigation of Damages.*—In an action for slanderous words imputing to the plaintiff whoredom with a particular man, the general bad character of the plaintiff for unchastity may be proved in mitigation of damages, but not particular acts of whoredom with other men, in either mitigation or justification. *Hallowell v. Gunile, 554*
2. *Same.—Presumption.—Instructions.—Reputation.*—In an action for slander, it is not error to instruct that a person, against whom a charge of whoredom has been made, is presumed to be innocent until the contrary is shown by a preponderance of the evidence; nor that if the plaintiff's reputation for chastity had not been called in question in the neighborhood of her residence, it was evidence of her good reputation in that respect; nor that if her reputation for chastity was bad, it was no defence to the action, but was to be considered in mitigation of damages. *Ib.*
3. *Same.*—In an action for slander, it is not necessary to prove the precise time when the words were spoken. *Ib.*

SOLDIER'S BOUNTY.

Burden of Proof on Claimant.—The board of commissioners of Rush county offered a bounty to volunteers enlisting in the military service of the United States, the offer to cease whenever the quota of the county was full.

Held, in an action by a claimant to recover the bounty, that the burden of proof was upon him to show that he enlisted and was credited to the county before the quota had been filled. *Morgan v. Board, etc., 257*

SPECIAL FINDING.

See JUDICIAL SALE, 4; LIQUOR LAW, 1; NEGLIGENCE, 1; PRACTICE, 8; VERDICT.

1. *Presumption.—Burden of Issue.*—Where the special finding of the court is silent upon any question of fact, such fact is regarded as found against the party upon whom the burden of the issue rests. *Ayers v. Adams, 109*

2. *Verdict*.—In considering a motion for judgment on special findings, notwithstanding a general verdict, no reference can be had to the evidence given, but if by any conceivable evidence admissible under the issues, the special findings can be reconciled with the general verdict, the motion should be denied *Pittsburgh, etc., R. W. Co. v. Martin*, 476
3. *General Verdict*.—*Judgment*.—If the special findings of the jury, on questions of fact submitted to them, can upon any hypothesis be reconciled with the general verdict, the latter will control, and the court will not render judgment against the party, who has in his favor the general verdict. *Baldwin v. Shuler*, 660

STATUTE CONSTRUED.

See CITY, 1, 2; CONTEMPTS, 1; CRIMINAL LAW, 4, 13; DECEDENTS' ESTATES, 1; DIVORCE; DRAINING ASSOCIATION; JUDICIAL SALE, 3; MARRIED WOMAN, 5; MECHANIC'S LIEN, 1; PARTITION, 1; PLEDGE, 1; TOWN, 3.

STATUTE OF FRAUDS.

See CONTRACT, 9.

STATUTE OF LIMITATIONS.

See BASTARDY, 2; VENDOR AND PURCHASER, 2.

1. *Board of County Commissioners*.—*County Treasurer*.—*Taxes*.—The statutory bar of six years operates upon the claim of a county treasurer made before a board of county commissioners for fees for the collection of delinquent taxes, due him and not allowed at the proper time of settlement. *Mathesie v. Board, etc.*, 172
2. *Sale of Personal Property*.—*Payment*.—*Account*.—Where a sale of personal property is made and nothing is said as to the time and manner of payment, the law implies a payment in cash at the time of delivery, and as the cause of action for the price of the property then accrues, the statute of limitations commences to run from that time, and a suit for the value of the property after the expiration of six years from the sale is barred by the statute. *Rous v. Walden*, 238

STOCKHOLDER.

See CORPORATIONS, 5 to 7; DRAINING ASSOCIATION.

STREET.

See CITY, 1 to 5.

SUBROGATION.

See JUDICIAL SALE, 1, 2; MORTGAGE, 1.

1. *Replevin Bail*.—*Principal and Surety*.—*Mortgage*.—Where several notes are secured by a mortgage, and a personal judgment is obtained on the note first due, a surety for stay of execution, who is compelled to pay the judgment, can not be subrogated to the mortgage security for reimbursement, unless he pays the entire indebtedness secured by the mortgage, or the same is otherwise satisfied without exhausting the mortgaged property. *Rice v. Morris*, 204
2. *Purchaser at Auditor's Invalid Sale of Land Mortgaged to School Fund*.—The purchaser of land sold by an auditor under a school fund mortgage, the sale having been set aside as invalid, may be subrogated to the rights of the State in the mortgage. *Willson v. Brown*, 471
3. *Same*.—*Mistake in Description*.—The fact that there was a mistaken description in a school fund mortgage, if the mistake was such as could have been corrected at the suit of the State, does not affect the right of subrogation on the part of the purchaser at a sale under the mortgage, upon the sale being set aside as invalid. *Ib.*

SUNDAY.

See LIQUOR LAW, 3.

SUPREME COURT.

- See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW, 1 to 5, 16; DECEDENTS' ESTATES, 5; JUDGMENT, 3, 5; NEGLIGENCE, 13; PRACTICE, 4, 7.
1. *Evidence*.—This court will not disturb a verdict for lack of evidence, if supported by some evidence, especially when against the party who had the burden of the issue. *Lamson v. Nat'l Bank, etc.*, 21
 2. *Practice*.—*Motion to Dismiss Appeal*.—*Diligence*.—A motion in the Supreme Court to dismiss an appeal because not prosecuted with diligence can be made only on call in open court. *Pattison v. Shaw*, 32
 3. *Practice*.—*Weight of Evidence*.—The Supreme Court will not disturb the verdict of a jury, or the finding of a trial court, upon the mere weight of the evidence. *Walker v. Beggs*, 45; *Robinson v. Ferrier*, 506; *Baldwin v. Shuter*, 560
 4. *Causes for New Trial*.—*Admission of Evidence*.—Rulings of the trial court in the admission of evidence, complained of as erroneous, must be assigned as causes for a new trial in the motion therefor; if not so assigned, the Supreme Court will not consider them, nor decide any question thereby presented. *Walker v. Beggs*, 45
 5. *Bill of Exceptions*.—*Motion to Strike Out*.—The ruling of the court in striking out a pleading must be shown by a bill of exceptions, to present any question thereon in the Supreme Court. *State v. Krug*, 58
 6. *Judgment*.—Objection to the form of a judgment can not be made, for the first time, in the Supreme Court. *Stephenson v. Ballard*, 87
 7. *Amended Pleading*.—*Presumption*.—The Supreme Court will presume that an amended pleading, following leave taken to amend, is properly certified as a part of the record. *Dick v. Hitt*, 92
 8. *Practice*.—*Evidence*.—Where the proof of a fact is clear and convincing, and yet the trial court has found the contrary without any evidence fairly tending that way, the finding, though against the party who had the burden of proof, will be set aside by the Supreme Court, especially when the witnesses were numerous, their testimony harmonious, and no attempt was made to impeach them, or to refute their statements by opposing evidence. *Stringer v. Northwestern, etc., Co.*, 100
 9. *Brief*.—*Waiver*.—All questions raised by a motion for a new trial, but not discussed by the appellant in his brief, are regarded as waived. *Stockton v. Lockwood*, 158
 10. *Evidence*.—*Practice*.—On appeal to the Supreme Court, no objection to the admission of evidence can be urged, which was not made in the court below. *Hays v. City of Vincennes*, 173
 11. *Practice*.—When a case has been tried and decided upon a given theory, and material error committed in admitting evidence, the Supreme Court will not consider whether, upon another theory, the decision might be upheld, unless the conclusion is clear. *Bristor v. Bristor*, 276
 12. *Practice*.—*New Trial*.—*Weight of Evidence*.—Where it appears that evidence was introduced on the trial tending to sustain the verdict on every material point, the Supreme Court will not reverse the judgment on the mere weight of the evidence. *Tute v. Means*, 355
 13. *Evidence*.—*Bill of Exceptions*.—Where a cause can not be fully considered or properly decided without an examination of the entire evidence, the bill of exceptions must affirmatively show that all the evidence is in the record. *Louisville, etc., R. W. Co. v. Murdock*, 381; *Ritter v. Wilson*, 601; *Bennett v. Crim*, 602

14. *Instructions.—Verdict.—Evidence.*—When the record affirmatively shows that the verdict was right upon the evidence, the judgment will not be reversed for error in instructions. *Simmon v. Larkin, 385; Hefkin v. Bevis, 338*
15. *Evidence.—Commission Merchant.—Counter-Claim.*—Where, to a suit for commissions, expenses, etc., in selling flour, a counter-claim for damages for neglect to sell for the best price obtainable, after direction by the defendant, is pleaded, and a verdict and judgment is rendered for the defendant thereon, the Supreme Court will not disturb the judgment on the weight of the evidence. *Halladay v. Wellington, 409*
16. *Evidence.—Verdict.—Account.—Set-Off.*—Where, on the trial of an action upon an account, to which a set-off is pleaded, the evidence is conflicting, and a verdict is returned disallowing the account, and for the defendant for the amount of his set-off, the Supreme Court will not disturb it. *Brown v. Norton, 411*
17. *Rehearing.*—Where a party, in the Supreme Court, having had abundant time, makes no argument until after the opinion is filed, a petition for a rehearing, merely objecting to the record and asking a decision of matters which he claims were overlooked by the court, will not be considered. *Bitting v. Ten Eyck, 421*
18. *Demurrer.—Exception.—Practice.*—The ruling of the trial court upon a demurrer presents no question to the Supreme Court unless an exception was reserved to the ruling. *Niven v. Burke, 455*
19. *Proper Cause Must be Shown by Record.*—A party complaining in the Supreme Court that his motion for leave to file additional answers was denied, must present a record showing that proper cause for his motion was brought before the trial court. *Hoffman v. Rothenberger, 474*
20. *Assignment of Error.—Defect of Parties.*—A defect of parties defendants can not be taken advantage of by a specification in an assignment of errors, that the complaint does not state facts sufficient to constitute a cause of action. *Bundy v. Pool, 502*
21. *Complaint.—Prayer.*—Informality or insufficiency in the prayer of a complaint is not reached by such a specification of error. *Ib.*
22. *Instructions.—Harmless Error.*—Where an instruction to the jury assumes a fact in issue to be true, and the evidence (all of which is not in the record) shows that such fact was established in proof, without any countervailing evidence appearing, the error is harmless, and not available in the Supreme Court. *Fullen v. Coss, 548*
23. *Judgment.*—When no objection is made below to the form of the judgment, none can be made in the Supreme Court. *Marquess v. LaBau, 550*
24. *Pleading.—Harmless Error.*—Where the trial court has erred in sustaining a demurrer to a paragraph of answer, and it appears that all the matters alleged therein could have been given in evidence under another paragraph on which issue was joined, the Supreme Court will regard the error as harmless, and will not reverse the judgment. *Heshion v. Julian, 576*

SURPRISE.

See NEW TRIAL, 4.

SURVEYS.

See REAL ESTATE, ACTION TO RECOVER, 3; TOWN, 1, 2.

TAXES.

See CITY, 7; EVIDENCE, 1; MANDAMUS, 3; RECEIVER, 2; STATUTE OF LIMITATIONS, 1; TENANT FOR LIFE; TOWN.

1. *Action Against County Treasurer for Selling Real Estate.—Complaint.—Personal Property.*—A complaint against a county treasurer to recover

damages for selling the plaintiff's lands for taxes, which alleges that the plaintiff had personal property within the county sufficient to make the taxes, and so informed the defendant, but fails to allege the character of the personal property, and that it was subject to seizure and sale, and that the property was shown to the officer, is bad on demurrer. *Bunnell v. Farris, 393*

2. *Injunction.—Complaint.*—A complaint to enjoin the collection of taxes, which fails to aver that such taxes have been placed upon the duplicate, and that it is in the hands of the proper officer for collection, is bad. *Worley v. Harris, 493*

TAX TITLE.

See ACTION TO QUIET TITLE, 3 to 6.

TENANT FOR LIFE.

Remainder-Man.—Taxes.—Burden of Proof.—A tenant for life is required to preserve the remainder by paying taxes and incumbrances, if the income of the estate is sufficient therefor; but, in a suit by the remainder-man against the tenant for life for failure of the latter in that respect, the burden of proof to show that the income of the estate was sufficient is on the plaintiff. *Clark v. Middlesworth, 240*

TENANTS IN COMMON.

See LANDLORD AND TENANT.

TENDER.

See MONEY; REDEMPTION.

TITLE.

See ACTION TO QUIET TITLE; BANKRUPTCY; COVENANTS; HUSBAND AND WIFE, 4; PARTITION, 3; PLEADING, 12; PROMISSORY NOTE, 12; REAL ESTATE, ACTION TO RECOVER; SHERIFF'S BOND, 2; SHERIFF'S SALE, 1 to 5, 9, 11, 12, 13.

TOLLS.

See GRAVEL ROAD, 1.

TORTS.

See GRAVEL ROAD, 2, 3; MILL; TRESPASS.

Tortfeasors.—Contribution.—Contract.—Consideration.—Promise.—There is no implied duty of contribution between tortfeasors, and, if a valid promise therefor can be made, there must be a consideration other than the fact of the tort and the relation of the accused parties to each other in the transaction; the promise of one who admits his own guilt to repay another whatever sum may be recovered of him by the injured party, made in consideration solely of the innocence of the promisee and of the guilt of the promisor, is not binding. *Nichols v. Nowling, 488*

TOWN.

See CITY, 6.

1. *Incorporation.—Taxes.—Injunction.—Complaint.*—A complaint to enjoin the collection of taxes levied by a town which had attempted to become incorporated under the general law of 1852 for that purpose, alleged as the basis for relief, that no accurate survey and map of the territory to be embraced had been made, and that the trustees had not, before the third Tuesday of May, determined the amount of general tax for the current year. *Worley v. Harris, 493*
2. *Same.—Waiver of Irregularities in Incorporation.—Prescription.*—The exercise of corporate powers for twenty years over a defined territory, with

the knowledge of the public, no question having been made as to its authority, is a waiver of irregularities in its organization and cures inaccuracies in the original survey and map, and is conclusive evidence of its incorporation. *Ib.*

3. *Same.*—*Time of Levy of Taxes.*—*Statute Construed.*—The requirement of section 3348, R. S. 1881, that the amount of general taxes shall be determined by incorporated towns before the third Tuesday of May, is, by section 3262 (a later statute), changed by necessary implication. "Determine," as used in section 3348, means to assess and levy, and this can not now be done until the county board of equalization has acted. *Ib.*

TOY PISTOL.

See NEGLIGENCE, 4.

TRANSCRIPT.

See EVIDENCE, 2; INSTRUCTIONS, 3; PRACTICE, 20; SHERIFF'S SALE, 16 to 18.

TRESPASS.

See GRAVEL ROAD, 2, 3; TORTS.

1. *Taking Ice.*—*Easement.*—The right to maintain a mill-dam and exercise the privileges belonging thereto, and to overflow thereby the lands of another, does not confer the right to take ice formed thereon. *Julien v. Woodsmall, 568*
2. *Same.*—*Railroad.*—By acquiring an easement in the lands of another, for the construction of its road across the same, a railroad company takes no right to ice which may form within the boundaries of its right of way. Such ice is the property of the owner of the land, and a stranger taking it is liable as a trespasser. *Ib.*

TRUST AND TRUSTEE.

See DECEDENTS' ESTATES, 2; FRAUDULENT CONVEYANCE, 1; GUARDIAN AND WARD; MARRIED WOMAN, 7; SHERIFF'S SALE, 2, 13; WILL, 1.

Agreement.—A resulting trust under section 2976, R. S. 1881, must arise when the trustee takes title, and can not be created by subsequent agreement, or by a subsequent use of trust funds in satisfying unpaid instalments of purchase-money. *Westerfield v. Kimmer, 365*

TURNPIKE.

See GRAVEL ROAD.

VARIANCE.

See NEGLIGENCE, 4; PROMISSORY NOTE, 12; RAILROAD, 3.

VENDOR AND PURCHASER.

See CONTRACT, 9; COVENANTS, 2; FRAUDULENT CONVEYANCE; MARRIED WOMAN, 5; MORTGAGE, 1; NOTICE, 1; SHERIFF'S SALE, 14, 15.

1. *Mortgage.*—*Contract.*—*False Representations.*—*Answer.*—*Duplicity.*—*Motion to Separate into Paragraphs.*—*Practice.*—To a complaint to foreclose a mortgage, it was answered, in a single paragraph, that the mortgage debt was for the difference in an exchange of farms with the mortgagee, and that, to induce the contract, the mortgagee made certain false representations concerning his farm (which were relied on), as to the quantity of timber land, the quantity of cleared land, the situation and capabilities of a cranberry marsh, the productiveness of the farm; that, as to the timber land, it was less valuable by \$500, as to the cranberry marsh, it was less valuable by \$500, and as to productiveness as a fruit farm, it was less valuable by \$1,000, than it was

represented, and that, by reason of false representations as to the ordinary produce of the land, the defendants were damaged \$400. It was also averred that \$100 was allowed and paid to the mortgagee for a growing wheat crop, which he was to take care of and did not, whereby it was lost, to the damage of defendants \$300, and that he carried away and sold the farm bell, to the damage of the defendants \$75.

Held, that the answer was good on demurrer.

Held, also, that a refusal to require the separation of the answer into three paragraphs was available error. *Hervey v. Parry*, 263

2. *Adverse Possession.—Statute of Limitations.*—The possession of lands by a vendor is subordinate, and not adverse, to the rights of his vendee, and the statute of limitations does not run during its continuance, so that the time thereof can be added to the time during which a subsequent purchaser may hold, so as to make a sufficient period to bar the rights of the first purchaser. *Jeffersonville, etc., R. R. Co. v. Oyster*, 394

3. *Same.—Notice.—Possession.*—Where the owner of a farm sells a portion, and the purchaser takes possession of a part only of the portion so sold, the vendor retaining possession of and using the residue as part and parcel of his farm, and said conveyance is not recorded, the vendee's possession of the part occupied and used by him is not constructive notice to a subsequent purchaser of the farm of the extent of his purchase. *Id.*

4. *Same.*—Mere possession is notice of a vendee's rights to land actually enclosed and occupied. *Id.*

5. *Vendor's Lien.—Mortgage.—Complaint.—Waiver.—Contract.—Promissory Note.—Decedents' Estates.—Evidence.*—The plaintiff held a note for purchase-money of real estate, on E. B., so that a vendor's lien might have been enforced. E. B. died solvent, leaving L. B. and others his heirs at law. The entire tract of land afterwards, by purchase from the other heirs of E. B., passed to L. B., who had notice of the plaintiff's lien. Afterwards L. B., in consideration of an assignment of the note (for which he received payment from E. B.'s administrator), executed to the plaintiff his own note for the amount thereof, specifying therein that it was "for purchase-money of land sold by the plaintiff." L. B. then conveyed a portion of the land to C., who had notice of the facts.

Held, that the complaint was not objectionable for praying a lien upon lands other than those subject thereto.

Held, also, that the lien was not waived by failure to enforce the debt against E. B.'s estate.

Held, also, that the note given by L. B. was a recognition of the plaintiff's lien, and an express undertaking by him to discharge it, and the plaintiff thereby released his claim on E. B.'s estate.

Held, also, that C. held the land subject to the satisfaction of the lien after L. B.'s property should be exhausted.

Held, also, that evidence was admissible, showing that the note of E. B. specified that it was given for purchase-money of land, and that E. B. declared, when he executed it, that that made it as good as a mortgage, and that the plaintiff required L. B. to make his note in the same form, so that it would be a lien on the land, was admissible as part of the *res gestæ*, and to show the intention to preserve a lien.

Held, also, that the note of L. B. was not an independent security, but must, under the circumstances, be regarded as a mere substitute for the note of E. B. *Boyd v. Jackson*, 525

VENDOR'S LIEN.

See VENDOR AND PURCHASER, 5.

VENIRE DE NOVO.

See VERDICT, 9.

VENUE.

See RAILROAD, 1; REAL ESTATE, ACTION TO RECOVER, 4.

VERDICT.

See CRIMINAL LAW, 3, 5, 15, 19; LIQUOR LAW, 1; MALICIOUS PROSECUTION, 1; NEGLIGENCE, 1, 9; NEW TRIAL, 1; PRACTICE, 19, 24; SPECIAL FINDING; SUPREME COURT, 14, 16.

1. *Special Finding*.—A motion for judgment, upon the special findings of the jury, *non obstante veredicto*, can not be sustained, where no fact is found inconsistent with the general verdict. *Hull v. Perry*, 28
2. *Interrogatories*.—A jury can only be required to answer interrogatories in case they find a general verdict, without instruction as to the party in whose favor it shall be. *Hadley v. Hadley*, 75
3. *Interrogatories*.—To determine whether the answers of a jury to interrogatories are inconsistent with the general verdict, all the answers must be considered. *Groves v. Hall*, 202
4. *Special Findings*.—*Interrogatories to Jury*.—The refusal to render judgment on special findings, notwithstanding a general verdict, is not available error, when the record does not show that the court submitted the interrogatories to the jury. *Hervey v. Parry*, 263
5. *Intendments*.—All reasonable intendments will be made in favor of a verdict. *Rose v. State*, 344
6. *Same*.—*Judgment*.—No valid judgment can be rendered upon a verdict which is radically defective. *Ib.*
7. *Special Findings*.—Where there is a general verdict, and also facts specially found upon questions sent to the jury, the latter will not affect the former, unless, when all taken together, they are in irreconcilable conflict with it; it is not enough that one of them, considered separately, shows such conflict. *Chambers v. Butcher*, 508
8. *Same*.—*Interrogatories*.—If two answers of the jury to interrogatories be in conflict with each other, both must be disregarded, in considering whether the general verdict is controlled by the special findings. *Ib.*
9. *Same*.—*Venire de novo*.—*Issue*.—*Pleading*.—*Cross Complaint*.—*Practice*.—Complaint to recover real estate, to which there was no answer, but a cross complaint averring facts which, if true, would defeat a recovery on the complaint; there was also an answer in avoidance of the cross complaint, but no reply. The record recited that "the cause being at issue, comes a jury," etc., and there was a verdict for the defendants, on the cross complaint, which took no notice of the complaint.
Held, that the complaint should, after verdict, be treated as if it had been denied, and that judgment for the plaintiff, for want of an answer or *non obstante veredicto*, should be refused.
Held, also, that the verdict must be regarded as for the defendants as well upon the complaint as upon the cross complaint. *Ib.*
10. *Same*.—Informality of a verdict will not vitiate it, if upon reasonable intendment it can be seen that it covers the issues, but the court will disregard form, and make it serve. It will be avoided only from necessity originating in doubt of its import, or its manifest tendency to injustice, or because the issues found are immaterial. *Ib.*

VINCENNES.

See CITY, 7.

VOLUNTARY ASSIGNMENT.

See SHERIFF'S BOND.

Lien of Execution.—A voluntary assignment for the benefit of creditors, made by an execution defendant, does not divest the lien of the execution. *State, ex rel., v. Krug, 58*

VOLUNTEER.

See HUSBAND AND WIFE, 2; JUDICIAL SALE, 1.

WAIVER.

See CONTEMPTS, 4; CRIMINAL LAW, 1; DRAINAGE, 5; MANDAMUS, 2; NEW TRIAL, 2; REDEMPTION, 2; SUPREME COURT, 9; TOWN, 2; VENDOR AND PURCHASER, 5.

WATERCOURSE.

See MILL; TRESPASS.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 3, 8, 12, 15.

WIDOW.

See DESCENTS, 2; WILL, 2, 3.

WILL.

See PLEADING, 13.

1. *Construction.*—*Trust and Trustee.*—*Assignment of Income.*—A will bequeathed a sum of money, "to be held in trust under the direction and supervision of the court having probate jurisdiction," for the use of A. and B. during their lives, in equal amounts, "the interest to be paid to them semi-annually" by the trustee, and in the event of their death the principal was to go to their heirs.

Held, that either beneficiary could make a valid assignment of the income bequeathed to him, before the time fixed for its payment, the will imposing no restriction in reference thereto. *Martin v. Davis, 38*

2. *Construction.*—*Widow.*—*Election.*—*Estate for Life.*—*Conveyance.*—The testator devised to his wife "all my property, real and personal, during her life, and at her death, if anything should remain, the same to be divided among my heirs at law." He left surviving him his wife and children and grandchildren. The wife afterwards executed a deed of conveyance of the whole of the real estate, for an adequate price, with covenant that she was lawfully seized of the same in fee simple.

Held, that the wife took an estate for life with power to sell and convey the whole estate in fee.

Held, also, that the execution of the deed by her was an election to take under the will, and not under the law giving her only a third in fee, and was such an execution of the power to convey as to vest in the purchaser the whole estate in fee. *Clark v. Middlesworth, 240*

3. *Devise to Wife.*—*Life-Estate.*—*Estate Undisposed of.*—*Construction.*—After a devise to the wife of one-third of all the testator's real estate, a definite estate has been "disposed of," and a further devise to her of "all the real estate," "to hold, use and occupy during her lifetime," followed by a devise of "land which remains undisposed of" at the testator's death to his children, gives her a life-estate in the remaining two-thirds. *McMahan v. Newcomer, 565*

4. *Same.*—*Heir.*—*Intention.*—It is not necessary, in order to create a fee by devise, that the testator should use the word "heir." A fee will pass, if, taking all the provisions of the will together, it is clear that the testator intended to vest such an estate in the devisee. *Id.*

5. *Same.*—*Shelley's Case.*—The rule in Shelley's case will not be allowed to defeat the plain intention of the testator. *Id.*

WITNESS.

See BILL OF EXCEPTIONS, 3; CONTINUANCE; CRIMINAL LAW, 23 to 26; EVIDENCE, 1; PRACTICE, 4; RAILROAD, 5.

Parties.—Contract with Ancestor Concerning Land.—Cross Petition.—Partition.
—In an action for partition between heirs of a common ancestor, wherein one of the defendants files a cross petition, claiming the exclusive ownership of a part of the land, by virtue of a grant from the ancestor, he may call a co-defendant to the original petition as a witness to the execution of the grant. In respect to the cross petition, such co-defendant is an opposite party. *Nye v. Lowry, 316*

WRITTEN INSTRUMENT.

See PARTNERSHIP; PLEADING, 9.

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